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No. 08-

In the Supreme Court of the United States

DAVID GREENWELL,

Petitioner,

v.

PAUL PARSLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was a deputy sheriff of Bullitt County, Kentucky, a jurisdiction that does not have a policy barring public employees from seeking political office. When petitioner announced that he was running for the office of sheriff as a Republican, respondent, the incumbent Democrat, fired petitioner the very same day, concededly (and solely) because petitioner had decided to run against him. Affirming the summary dismissal of petitioner's subsequent suit, the Sixth Circuit held—in acknowledged conflict with four other circuits—that petitioner's termination does not even implicate the First Amendment because, purportedly, "the First Amendment * * * has not been extended to candidacy alone" and "the simple announcement of a candidacy" does not constitute "protected political speech."

The question presented is whether the First Amendment is implicated when a public employee is fired for announcing his candidacy for elected office.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Greenwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (App., *infra*, 1a–9a) is reported at 541 F.3d 401. The Sixth Circuit's order denying rehearing (*id.* at 23a–24a) is unreported. The initial decision of the United States District Court for the Western District of Kentucky granting summary judgment to the respondent (*id.* at 17a–22a) is not included in any official reporter, but is available at 2007 WL 196896. The district court's subsequent opinion denying petitioner's motion to vacate the judgment (*id.* at 10a–16a) is similarly available at 2007 WL 1406955.

JURISDICTION

The Sixth Circuit issued its decision on September 2, 2008, and denied rehearing on January 26, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution—which "applies to the States through the Fourteenth" Amendment (*Mills* v. *Alabama*, 384 U.S. 214, 218 (1966))—provides, in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

This case presents an important and recurring question that this Court has never directly addressed and that has openly divided the lower courts: Is the First Amendment implicated when a public employee, permitted by state and municipal law to seek elected office, is fired for announcing his candidacy against his ultimate superior?

In the decision below, the Sixth Circuit reaffirmed yet again its long-standing view that the First Amendment affords *no* protection to a public employee fired under these circumstances because, purportedly, "the First Amendment * * * has not been extended to candidacy alone" and the "simple announcement of a candidacy" does not constitute "protected political speech." App., *infra*, 5a–6a.

The Sixth Circuit's opinion stands in palpable tension with numerous decisions of this Court, including those holding: (1) that there *is* a First Amendment interest in political candidacy (see, *e.g.*, *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974)), and that speech relating to political campaigns is a core concern of the First Amendment (see, *e.g.*, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271–272 (1971)); (2) that the First Amendment permits an adverse employment action against a public employee for speaking publicly on a matter of public concern if, but only if, the employer's interest in the efficient delivery of services outweighs the employee's interest in commenting on matters of public concern (see, *e.g.*, *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968)); and (3) that the First Amendment allows the dismissal of a public employee for lack of political loyalty if, but only if, political loyalty is necessary for

the effective performance of the employee's job (see, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980)).

The decision below—which reaffirms for the third time a rule adopted by the Sixth Circuit more than a decade ago—also directly conflicts with decisions of at least four other circuits, each of which has squarely held that the First Amendment *is* implicated, at least under certain circumstances, when a public employee announces his candidacy for public office. In addition to dividing the circuits, the question presented has confused them, leading to unpredictable and at times perverse results.

The Sixth Circuit's decision is both wrong and consequential. By completely denying any First Amendment protection to a public employee's announcement of his candidacy for elected office, the Sixth Circuit effectively grants public employers unchecked authority to fire any subordinate who decides to seek elected office. Thus, the decision below not only allows public employers to adopt (constitutionally permissible) viewpoint-neutral policies that bar public employees from engaging in partisan activity generally, but also allows public employers to engage in (constitutionally impermissible) viewpoint discrimination by—as was the case here—selectively punishing only those employees who campaign against a particular candidate or party.

In addition to negating the First Amendment rights of public employees who might wish to seek elected office, the Sixth Circuit's decision also harms voters. Particularly at the state and local level, the people who are most knowledgeable about governmental operations, be it the county clerk's office or the local water board, are often the very same public employees who hold positions subordinate to the

elected official currently heading the relevant governmental entity. Consequently, any rule—such as the one adopted by the Sixth Circuit—that exposes these employees to the threat of termination upon announcing their candidacy for office will inevitably reduce the universe of qualified candidates willing to seek office, and thus harm voters both by depriving them of the employees' insights during the campaign and by limiting their choice of candidates at the ballot box.

Because the Sixth Circuit's decision affects important federal rights in an oft-repeated context, because the decision below is in tension with decisions of this Court and in open conflict with decisions of several other circuits, because the lower court split has led to confusion and will not be resolved absent this Court's intervention, and because the rule adopted by the Sixth Circuit is plainly wrong, review by this Court is clearly warranted.

A. Factual Background

From 1999 to 2005, petitioner David Greenwell was a deputy sheriff of Bullitt County, Kentucky. In 2005, Greenwell decided to switch party affiliation and run for the office of Bullitt County sheriff as a Republican. An article discussing Greenwell's candidacy appeared on September 7, 2005, in the LOUISVILLE COURIER-JOURNAL. App., *infra*, 3a. The article reported that, if elected, Greenwell planned on creating a public relations position within the sheriff's department that would "follow up with people who file police reports to make sure the department handled their complaint[s] to their satisfaction," an innovation that Greenwell believed "would hold deputies accountable and improve the department's image." *Ibid.*

Respondent Paul Parsley, a Democrat, was the incumbent Bullitt County sheriff. Upon reading the LOUISVILLE COURIER-JOURNAL article and learning of Greenwell's candidacy, Parsley called Greenwell into his office. During the meeting that followed, Parsley showed Greenwell a copy of the article, in which Parsley had highlighted the portions reporting that Greenwell was running for sheriff and describing Greenwell's statements about the changes he would bring to the sheriff's office if elected.

Parsley fired Greenwell later that same day. Upon doing so, he providing Greenwell with a termination letter that stated:

> This will confirm that as of September 7, 2005 you informed the public and me personally that you are running against me for Sheriff in the 2006 election. Therefore, I am terminating your employment with me and my office for obvious reasons.

App., *infra*, 4a. Parsley subsequently testified that he had fired Greenwell because "'[h]e wanted to take my job away from me. . . . He put it in the paper he was running for sheriff—was gonna take my job.'" *Ibid.*[1]

It was not the first time that Greenwell had announced a run for office while serving as a Bullitt County deputy sheriff. In 2002, Greenwell, then a Democrat, unsuccessfully sought the position of Bullitt County jailer. No adverse employment action was taken against Greenwell at that time. This was con-

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[1] Ultimately, neither Greenwell nor Parsley was elected sheriff. Parsley lost the Democratic primary, and Greenwell lost the general election. App., *infra*, 4a.

sistent with the fact that neither Kentucky nor Bullitt County has prohibited at-will public employees from seeking political office. In fact, five Bullitt County sheriff's department employees other than Greenwell ran for offices other than sheriff during the 2006 election cycle. As Parsley concedes, "none suffered any adverse employment action, just like Greenwell in 2002." Appellee's Brief at 12, *Greenwell* v. *Parsley*, 541 F.3d 401 (6th Cir. 2008) (No. 07-5694), 2007 WL 4963214. Indeed, Parsley candidly admits that "[t]he difference in this case is that Greenwell chose to run for the position held by Sheriff Parsley." *Ibid.*

B. Proceedings Below

Greenwell filed suit under 42 U.S.C. § 1983 alleging, in relevant part, that he had been fired in retaliation for exercising his First Amendment rights.[2] Given Parsley's concession about his motivation for firing Greenwell, there was no dispute as to the relevant facts, and Parsley moved for summary judgment. Finding that Greenwell was fired because he "announc[ed] his intention to take his boss's office," an act that the court characterized as "personal insubordination" (App., *infra*, 21a), the district court granted Parsley's motion for summary judgment, concluding that because "Greenwell chose to express his political views by running for the political office

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[2] Initially, Greenwell brought claims against Parsley and another defendant under both 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Subsequently, however, Greenwell voluntarily dismissed all claims against the second defendant, and the § 1985 claim against Parsley, who was sued both individually and in his official capacity as Sheriff of Bullitt County. App., *infra*, 18a n.1.

held by his boss" "*Carver* v. *Dennis*, 104 F.3d 847 (6th Cir. 1997), governs our case and requires dismissal." App., *infra*, 20a.

The district court denied Greenwell's subsequent motion to vacate the judgment, adhering to its earlier conclusion that Greenwell had been fired "solely for seeking his boss's position." App., *infra*, 14a. In continued reliance on *Carver*, the district court held that "[i]nsubordination in seeking his boss's position was not a constitutional right of the plaintiff, so the court need not apply the [*Pickering*] balancing test." *Ibid.*[3]

Noting that "there is nothing in the record to belie the conclusion that the termination was because of [Greenwell's] candidacy" (App., *infra*, 6a–7a), the Sixth Circuit affirmed. A panel of that court agreed that "this case cannot be meaningfully distinguished from *Carver*" and, in doing so, expressly reaffirmed the Circuit's prior holding that First Amendment protection does "not * * * extend[ ] to candidacy alone" and that "the simple announcement of a candidacy" does not constitute "protected political speech" because "[t]he announcement of candidacy 'is nothing more than the assertion of a rival candidacy.'" *Id.* at 5a–7a.

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[3] Having concluded that Greenwell's First Amendment rights were not implicated by his firing, the district court—in an apparent allusion to *Branti* and *Elrod* v. *Burns*, 427 U.S. 347 (1976)—also stated that it "need not examine whether a close working relationship existed that would afford the sheriff a wide degree of deference in his firing decisions." App., *infra*, 14a–15a. Cf. *Carver*, 104 F.3d at 850 (holding that plaintiff's "discharge implicates none of the concerns raised by *Elrod* or *Branti*").

Judge Martin concurred only in the judgment. He agreed that *Carver* was controlling circuit authority, but wrote "separately to point out once again the weak precedential support for" *Carver* and to "express [his] hope" that the Sixth Circuit would "revisit this critical First Amendment issue en banc." App., *infra*, 7a. Noting that "the holding in *Carver* was based on two decisions that do not support its final conclusion" and might have been animated by "hostility to the First Amendment," Judge Martin observed that the rule adopted in *Carver* and reaffirmed below "puts [the Sixth Circuit] in opposition with as many as six other circuits, which have held that firings based on one's political candidacy do violate the First Amendment." *Id.* at 7a–8a. Likening *Carver* to "a stray cat that hangs around the door and infests the house with fleas," Judge Martin bemoaned the fact that *Carver* "continues to plague [Sixth Circuit] jurisprudence." *Id.* at 8a–9a. But, notwithstanding Judge Martin's plea that it revisit the rule announced in *Carver* and reaffirmed by the panel, the Sixth Circuit denied Greenwell's petition for rehearing en banc. *Id.* at 23a–24a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION—WHICH HOLDS THAT A PUBLIC EMPLOYEE'S CANDIDACY FOR POLITICAL OFFICE DOES NOT EVEN IMPLICATE THE FIRST AMENDMENT—IS IN TENSION WITH PRIOR DECISIONS OF THIS COURT AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit's rule, first announced in *Carver* and reaffirmed in this case, is inconsistent with this Court's constitutional jurisprudence and in

open conflict with decisions of at least four other circuits. As the Sixth Circuit has explained, *Carver*'s essential holding is that "there is no protected right to candidacy under the First Amendment." *Murphy* v. *Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007). Thus, under *Carver* and the decision below, public employers are, as a matter of First Amendment law, free to fire (or otherwise discipline) public employees for seeking political office without any constitutional limitation whatsoever. That result, which—as illustrated by this case—permits viewpoint discrimination against a public employee for challenging a particular candidate or party, cannot be reconciled with this Court's precedent or the decisions of other circuits.

A. The Sixth Circuit's Holding Is In Tension With This Court's Repeated Recognition That Citizens, Including Public Employees, Have First Amendment Interests In Running For Elected Office, Speaking On Matters Of Public Concern, And Participating In The Political Process.

1. This Court has recognized that restrictions on political candidacy implicate the First Amendment.

This Court has stated frequently that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271–272 (1971). See also, *e.g.*, *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Roy*). That oft-repeated admonition reflects the "practically universal agreement that a major purpose of" the First Amendment is "to protect

the free discussion of governmental affairs," including "discussions of candidates, * * * the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills* v. *Alabama*, 384 U.S. 214, 218–219 (1966). Moreover, because "an election campaign is a means of disseminating ideas as well as attaining political office," it is clear that "[o]verbroad restrictions on ballot access jeopardize [a] form of political expression." *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979).

Accordingly, although this Court has never passed on the question directly, its decisions have repeatedly recognized that political candidacy *does* implicate critical First Amendment interests. Indeed, one of the very cases cited by the Sixth Circuit in reaching the opposite conclusion, *Clements* v. *Fashing*, 457 U.S. 957 (1982), expressly acknowledges individuals' "First Amendment interests in candidacy." *Id.* at 971; see also *id.* at 977 n.2 (Brennan, J., dissenting) ("we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters").[4]

Consistent with its recognition that individuals possess a First Amendment interest in candidacy, this Court has time and again declared unconstitu-

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[4] *Clements* upheld the particular ballot restrictions at issue on the ground that they imposed only "*de minimis* interference with appellees' interests in candidacy." 457 U.S. at 971–972 (plurality opinion). The Sixth Circuit misread *Clements*, erroneously taking this Court's statement that candidacy has not been recognized as a "fundamental right" for purposes of equal protection analysis (*id.* at 963) to mean that there is no First Amendment right to candidacy at all (cf. *Carver*, 104 F.3d at 851).

tional laws that unduly restrict candidates' access to the ballot. See, *e.g.*, *Socialist Workers Party*, 440 U.S. at 184 (invalidating ballot restriction because, *inter alia*, it impaired freedom to associate); *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974) (striking down, on First Amendment and equal protection grounds, excessive filing fee that burdened "an individual candidate's * * * important interest in the continued availability of political opportunity"); *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972) (upholding constitutional challenge brought by prospective candidates against statute that "create[d] barriers to candidate access to the primary ballot"); *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) (invalidating ballot restriction because it burdened, *inter alia*, the freedom of association that "is protected by the First Amendment"); see also, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 644 (1978) (White, J. concurring) ("Our cases have recognized the importance of the right of an individual to seek elective office and accordingly have afforded careful scrutiny to state regulations burdening that right."). Although they were ultimately decided largely on equal protection grounds, "[t]he First Amendment * * * lies at the root of these cases." *Williams*, 393 U.S. at 38 (Douglas, J., concurring).[5]

Moreover, this Court's "ballot access cases based on First Amendment grounds have rarely distinguished between the rights of candidates and the rights of voters." *Cook* v. *Gralike*, 531 U.S. 510, 531

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[5] Equal protection analysis requires that the Court identify and weigh the individual interest that the plaintiff alleges is being discriminatorily denied. Thus, when deciding equal protection cases involving ballot access, the Court's recognition of a right to candidacy is not mere dictum, but rather a necessary element of the decision.

(2001) (Rehnquist, C.J., concurring). On the contrary, this Court recognizes that "the rights of voters and the rights of candidates do not lend themselves to neat separation" (*Bullock*, 405 U.S. at 143) because "voters can assert their preferences only through candidates" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)). Thus, any infringement of a candidate's right to candidacy is simultaneously an impairment of the voters' right to vote.

The Sixth Circuit ignored this substantial body of precedent when it erroneously concluded that the First Amendment's protections do "not * * * extend[] to candidacy." App., *infra*, 5a.

2. This Court has recognized that the First Amendment protects the rights of public employees to speak on matters of public concern—especially matters relating to electoral politics.

For more than a half-century, this Court has "unequivocally rejected" the view that public employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968) (citing *Keyishian* v. *Bd. of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952)). Recognizing instead that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection" (*Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980)), the Court has repeatedly held that "the First Amendment protects," albeit with certain limita-

tions, "a public employee's right * * * to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006).

Accordingly, when a public employee challenges an adverse employment action taken against the employee because of his or her speech, the court hearing that challenge must ask two questions. The first question, the threshold question,

> requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Garcetti, 547 U.S. at 418 (citations omitted).

But in the decision below, as in *Carver*, the Sixth Circuit either failed to apply this analytic framework at all, or failed to apply it correctly. According to the court of appeals, petitioner's declaration that he intended to run for the office of sheriff was not entitled to any First Amendment protection because, purportedly, "the simple announcement of a candidacy" does not constitute "protected political speech." App., *infra*, 5a–6a. The precise basis for the Sixth Circuit's holding is unclear. Perhaps the court believes that an announcement of candidacy for elected office does not address a matter of public concern; alternatively, the Sixth Circuit might believe that such an announcement is unprotected even though it addresses

a matter of public concern. Either way, the decision below is plainly at odds with prior decisions of this Court.

Any suggestion that an announcement of candidacy for elected office does not address a matter of public concern is frivolous. This Court has "recognized repeatedly that 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution'" (*Eu*, 489 U.S. at 223 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam)), and thus "is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 781 (2002) (quoting *Eu*, 489 U.S. at 222–223). Because the electorate must know who the candidates for office are before their qualifications can be debated, the candidates' announcements of their respective candidacies are a prerequisite for informed discussion among voters. As such, candidacy announcements are indeed matters of public concern, which include, *inter alia*, all "matters as to which 'free and open debate is vital to informed decisionmaking by the electorate.'" *Rankin* v. *McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (quoting *Pickering*, 391 U.S. at 571–572).

To the extent the Sixth Circuit's holding rests on the proposition that a public employee's candidacy announcement is entirely outside the zone of First Amendment protection although it addresses a matter of public concern, the decision below is clearly contrary to *Pickering* and its progeny. This Court's precedents simply do not leave room for a determination that a public employee's speech, although addressed to matters of public concern, can be punished without triggering any First Amendment scrutiny at

all. On the contrary, when evaluating a public employee's First Amendment claim, courts must "seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 142 (quoting *Pickering*, 391 U.S. at 568). Of course, the employer's interest may ultimately be found to outweigh the employee's interest in a particular case, but such a determination can be made only *after* recognition and due consideration of the employee's constitutional interest in commenting on matters of public concern.[6]

According to the Sixth Circuit, "*Pickering* * * * do[es] not apply" (*Carver*, 104 F.3d at 852) when a public employee announces that he is running for the office currently held by his ultimate superior because

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[6] Moreover, when weighing the employee's interest in speaking on matters of public concern, courts must be mindful that "the First Amendment interests at stake extend beyond the individual speaker" given "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Garcetti*, 547 U.S. at 419. See also *San Diego* v. *Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues."); *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work."); *Pickering*, 391 U.S. at 571–572 (because "free and open debate is vital to informed decision-making by the electorate" and because public employees "are, as a class, the members of a community most likely to have informed and definite opinions" regarding governmental operations, "it is essential that they be able to speak freely on such questions without fear of retaliatory dismissal").

"'[t]he First Amendment does not require that an official in [an employer's] situation nourish a viper in the nest.'" App., *infra*, 5a (quoting *Carver*, 104 F.3d at 853). But contrary to the rule announced in *Carver* and reaffirmed below, the mere fact that petitioner's announcement of his candidacy was directed against—and thus implicitly critical of—his ultimate superior does not categorically deprive petitioner's announcement of all First Amendment protection. As this Court stated in *Pickering*, "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." 391 U.S. at 574 (citing *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Wood* v. *Georgia*, 370 U.S. 375 (1962)). Thus, as made clear by *Pickering* itself, the *Pickering* balancing test *does* apply to petitioner's announcement of his candidacy for sheriff.

3. This Court has recognized that restrictions on political participation by public employees must, at minimum, either be viewpoint neutral or advance a governmental rather than partisan interest.

Petitioner acknowledges that the First Amendment rights of public employees are subject to certain limitations that do not apply to other citizens. But, as this Court has made clear in its decisions concerning the Hatch Act and patronage dismissals, restrictions on public employees' political participation must be either viewpoint-neutral or necessary for the achievement of a governmental rather than partisan interest.

When considering the Hatch Act and its state-law equivalents, this Court has upheld legislative enactments that prohibit identifiable categories of

public employees from engaging in certain defined political activities. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers* v. *Mitchell*, 330 U.S. 75 (1947). In so doing, however, the Court has taken pains to emphasize that the restrictions it has approved "are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described." *Letter Carriers*, 413 U.S. at 564. See also *Broadrick*, 413 U.S. at 616 (noting that statute at issue "is not * * * directed at particular groups or viewpoints"); *James* v. *Tex. Collin County*, 535 F.3d 365, 378 n.12 (5th Cir. 2008) ("Central to [the Court's First Amendment] holding was that the Hatch Act's prohibitions were neutral and nondiscriminatory."). That result, of course, accords with "[t]he principle of viewpoint neutrality that underlies the First Amendment itself." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984).

When considering the constitutionality of patronage (*i.e.*, the practice of allocating public jobs based on political loyalty), this Court has recognized that it "clearly infringes First Amendment interests" (*Elrod* v. *Burns*, 427 U.S. 347, 360 (1976)) by "severely restrict[ing] political belief and association" (*id.* at 372). Nonetheless, this Court has held patronage dismissals to be constitutional, but only where "they advance[] a governmental, rather than a partisan, interest." *Branti* v. *Finkel*, 445 U.S. 507, 517 n.12 (1980). Thus, patronage dismissals are permissible if, but only if, "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

The decision below disregards this Court's teachings in its Hatch Act and patronage opinions.

First, unlike the generally applicable, viewpoint-neutral statutes upheld in *Letter Carriers*, *Broadrick*, and *Mitchell*, the *ad hoc* restriction on political activity approved by the Sixth Circuit in this case (and in *Carver*) *was* "aimed at [a] particular part[y] * * * or point[] of view" and did *not* "apply equally to all partisan activities of the type" involved. *Letter Carriers*, 413 U.S. at 564. Petitioner was fired not because he ran for office generally, nor even because he ran for the office of sheriff in particular, but rather because he ran for the office of sheriff *against the current incumbent*. Indeed, respondent admits that other sheriff's department employees ran for offices other than sheriff, that "none suffered any adverse employment action," and that "[t]he difference in [petitioner's] case is that [petitioner] chose to run for the position held by Sheriff Parsley." Appellee's Brief at 12, *Greenwell* v. *Parsley*, 541 F.3d 401 (6th Cir. 2008) (No. 07-5694), 2007 WL 4963214. Although "it would obviously not be permissible for the government to prohibit employees only from running against incumbents" (*James*, 535 F.3d at 378 n.12), that is precisely what the Sixth Circuit's rule allows.

Second, contrary to this Court's admonition that patronage dismissals are constitutionally permissible only if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" (*Branti*, 445 U.S. at 518), the Sixth Circuit required no such showing on respondent's part. Indeed, the Sixth Circuit did not even consider whether petitioner—who at the time of his termination was one of thirty-seven Bullitt County deputy sheriffs

(see App., *infra*, 14a)—held a post whose effective performance required political loyalty to respondent.[7] In fact, far from "advanc[ing] a governmental, rather than a partisan, interest" (*Branti*, 445 U.S. at 517 n.12), respondent's dismissal of petitioner seems to have been motivated by nothing more than respondent's pique at petitioner's "'rival candidacy.'" App., *infra*, 6a–7a.[8] Nonetheless, in the Sixth Circuit's

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[7] Cf. *Heggen* v. *Lee*, 284 F.3d 675 (6th Cir. 2002) (holding that Kentucky deputy sheriffs are entitled to First Amendment protection from patronage firings).

[8] If a restriction placed on a public employee's political participation is not viewpoint-neutral, then the fact that it "advance[s] a governmental, rather than a partisan, interest" is merely a necessary but insufficient condition for finding that restriction constitutional; it must first be shown that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 517–518 & n.12. If that threshold showing is not made, then the restriction cannot survive scrutiny under *Branti*. Moreover, because political candidacy is inherently both a speech act ("vote for me and the policies I espouse") and an associational act ("join with me in my campaign to get me elected"), a candidacy restriction that is not viewpoint-neutral is unconstitutional unless it also satisfies the *Pickering* test, which applies when a public employee is prevented from (or disciplined for) speaking on a matter of public concern. See *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U.S. 712, 719 (1996) (recognizing that "the balancing *Pickering* mandates will be inevitable" in cases "where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement"). Because the *Pickering* test requires that the State's interest in efficient delivery of public services *outweigh* the employee's interest in discussing matters of public concern for the speech restriction to be constitutional (see *Pickering*, 391 U.S. at 568), a restriction that survives scrutiny under *Branti* may nonetheless fail the *Pickering* test.

view, petitioner's "discharge implicates none of the concerns raised by *Elrod* or *Branti*." *Carver*, 104 F.3d at 850. That holding cannot be reconciled with this Court's teachings.

B. The Courts Of Appeals Are Divided And Confused By The Question Presented.

The question whether a public employee's candidacy for elected office is protected by the First Amendment has divided and confused the courts of appeals. As Judge Martin noted in his concurring opinion below (see App., *infra*, 7a–8a & n.1), the Sixth Circuit's holding that the First Amendment does not protect a public employee's candidacy announcement conflicts with decisions of several other circuits. In addition to dividing the circuits, the question presented by this petition has also confused them, leading to results that are unpredictable and at times perverse. This Court's guidance is urgently needed to resolve the conflict and confusion among the circuits.

The decision below is contrary to decisions of the Fifth, Seventh, Ninth, and Tenth Circuits, each of which has squarely recognized that the First Amendment *is* implicated, at least in certain circumstances, when a public employee is fired or otherwise disciplined for simply declaring his or her candidacy for elected office.[9] In *Click* v. *Copeland*, 970 F.2d 106

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[9] The Sixth Circuit has acknowledged the split on at least three occasions. See App., *infra*, 5a–7a; *Murphy*, 505 F.3d at 450 n.1 (noting that "[o]ther Circuits have not followed Carver"); *Myers* v. *Dean*, 216 F. App'x 552, 555 (6th Cir. 2007) (acknowledging "other circuits' holdings," but pronouncing itself "bound by *Carver*"). See also *Deemer* v. *Durrell*, 110 F. Supp. 2d 1177, 1181 (S.D. Iowa 1999) (noting split). In his concurring

(5th Cir. 1992), for example, the Fifth Circuit considered whether the First Amendment rights of two deputy sheriffs were violated when the incumbent sheriff, who was running for reelection, "transferred them to less desirable positions in retaliation for announcing their candidacy for the sheriff's office." *Id.* at 108. Finding that their "conduct, running for elected office, addressed matters of public concern," the Fifth Circuit readily concluded—in a holding directly contrary to the Sixth Circuit's holding below—that the deputies' candidacies were "protected by the First Amendment" and that it was therefore necessary "to engage in * * * *Pickering-Connick* balancing." *Id.* at 111–112. Similarly, in *Jantzen* v. *Hawkins*, 188 F.3d 1247 (10th Cir. 1999), the Tenth Circuit—considering the case of a deputy sheriff who was fired immediately after announcing his candidacy against the incumbent sheriff—squarely held that the deputy's "candidacy for office" constituted "political speech" that "undoubtedly relates to matters of public concern" and therefore "satisfies the first prong of the *Pickering/Connick* test." *Id.* at 1257. See also *Finkelstein* v. *Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) (holding, in a case involving an assistant prosecutor punished for running against his ultimate supervisor's preferred candidate, that "[d]isciplinary action discouraging a candidate's bid

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opinion below, Judge Martin observes that *Carver* puts the Sixth Circuit "in opposition with as many as six other circuits." App., *infra*, 7a–8a. Judge Martin cites decisions of the First, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits (but none from the Fifth or Tenth Circuits). See *id.* at 8a n.1. As discussed below (see *infra*, 22 n.10), the cases from the First, Fourth, Eighth and Eleventh Circuits cited by Judge Martin recognized, albeit in other contexts, individuals' constitutionally protected interest in running for public office.

for elective office 'represent[ed] punishment by the state based on the content of a communicative act' protected by the first amendment") (quoting *Newcomb* v. *Brennan*, 558 F.2d 825, 828–829 (7th Cir. 1977)).[10]

In *Newcomb*—which involved a deputy city attorney who "was dismissed when, against the wishes of the city attorney, he announced his intention to run for Congress" (558 F.2d at 827)—the Seventh Circuit held, like the Sixth Circuit below, that "plaintiff's interest in seeking office, by itself, is not entitled to constitutional protection" (*id.* at 828). But, in direct conflict with the Sixth Circuit's holding in this

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[10] Several other circuits, and at least one state court of last resort, have recognized, in other contexts, that citizens have a constitutionally protected interest in seeking public office. See *Flinn* v. *Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) (stating in dicta that plaintiff "certainly had a constitutional right to run for office"); *Washington* v. *Finlay*, 664 F.2d 913, 927–928 (4th Cir. 1981) (acknowledging "[t]he first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate"); *Magill* v. *Lynch*, 560 F.2d 22, 29 (1st Cir. 1977) ("Candidacy is a First Amendment freedom."); *Bolin* v. *State Dep't of Pub. Safety*, 313 N.W.2d 381, 382 (Minn. 1981) (recognizing, in decision invalidating resign-to-run rule, that "[w]hile the right to run for public office has not been characterized as fundamental, it is an important right protected by the first amendment"). See also *Stiles* v. *Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (acknowledging "the right to run for public office" while noting that it is not a "fundamental" right for purposes of equal protection analysis); *United States* v. *Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) ("There is no question that candidacy for office and participating in political activities are forms of expression protected by the first amendment."), abrogated on other grounds by *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998).

case, the Seventh Circuit nonetheless concluded that the "plaintiff's interest in seeking office was protected by the First Amendment" because the employer who dismissed him was not acting pursuant to a "facially neutral program" but instead "wished to discourage [plaintiff's] candidacy in particular." *Id.* at 828–829.

Although the Fifth, Seventh, Ninth, and Tenth Circuits have, in contrast to the Sixth, held that First Amendment interests are, at least potentially, implicated when a public employee is fired simply for declaring his or her candidacy for elected office, confusion among the courts as to the source and scope of the First Amendment's protection has led to unpredictable and sometimes bizarre results.[11] In *Jantzen*, for example, the Tenth Circuit held that although the candidate's right to *free speech* was implicated by his dismissal, his right to *free association* was not, because "[t]he right to political affiliation does not encompass the mere right to affiliate with oneself" and thus, purportedly, does not protect the candidate's right to participate in his own campaign. 188 F.3d at 1252 (holding that "candidacy *qua* candidacy" does not implicate associational rights) (citing, *inter alia*, *Carver*, 104 F.3d at 850). Consequently, the

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[11] The rule adopted in *Carver* has also led to unpredictable results within the Sixth Circuit. Compare *Murphy*, 505 F.3d at 450 (holding *Carver* inapplicable and reversing grant of summary judgment to defendant employer because the firing was based on the employee's speech "during the course of her campaign" rather than her candidacy announcement at the outset of her campaign), with *Myers*, 216 F. App'x at 555 (affirming, on basis of *Carver*, summary dismissal of suit brought by employee who was dismissed immediately after election by victorious rival candidate).

Tenth Circuit held, it was only the candidate's fellow public employees—who had been disciplined for supporting his candidacy—and not the candidate himself who had an associational claim. *Ibid.*[12] Similarly odd is the result in *Bart* v. *Telford*, 677 F.2d 622 (7th Cir. 1982). In that case, the Seventh Circuit held that a public employee's First Amendment speech rights were not implicated when she was forced to leave her job upon her announcement of her *own* candidacy (because the employer's action was purportedly viewpoint-neutral), but that her speech rights were implicated when, after ending her run for office, she endorsed *someone else's* candidacy. See *id.* at 624–625.

Because the conflict and confusion surrounding a public employee's First Amendment right to announce his or her candidacy for elected office is both deep and persistent, this Court's intervention is warranted.

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[12] The Fifth Circuit, by contrast, has recognized that an employee's candidacy against his or her boss does "involve[]" the employee's "political affiliation" precisely because that candidacy makes the employee the "boss's political rival." *Jordan* v. *Ector County*, 516 F.3d 290, 297 (5th Cir. 2008); see also *id.* at 296 (recognizing that the "*Elrod-Branti* doctrine applies when an employment decision is based upon support of and loyalty to a particular candidate as distinguished from a political party") (internal quotation marks omitted); cf. *Carver*, 104 F.3d at 850 (employee's discharge for rival candidacy "implicates none of the concerns raised by *Elrod* or *Branti*").

II. THE SIXTH CIRCUIT'S RULE DENYING ALL FIRST AMENDMENT PROTECTION TO PUBLIC EMPLOYEES FIRED FOR SEEKING ELECTED OFFICE THREATENS SIGNIFICANT AND PERNICIOUS CONSEQUENCES.

The issue presented in this petition has national significance. While thirty-five States have enacted "little" Hatch Acts, which limit the political activities of public employees (on a viewpoint-neutral basis),[13] fifteen other States and countless municipalities have not—presumably because they have concluded that their communities benefit when public employees *are* permitted to run for elected office. Certain States, including Kentucky, limit the political activities only of career civil service employees, and thus exempt at-will employees like petitioner from those restrictions. See App., *infra*, 22a; Ky. Rev. Stat. § 18A.140 (restricting political activities of "classified service" employees").[14] Accordingly, in every such jurisdiction, many (or all) public employees may run for elected office unimpeded by any statutory prohibition. What they face instead, in the absence of guidance from this Court, is the specter that they will nonetheless be fired or otherwise disciplined because their boss does not approve of their campaign in particular. This situation inevitably chills the po-

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[13] See Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 794 (2000).

[14] Conversely, only career civil servants are statutorily protected against patronage dismissals in Kentucky. See App., *infra*, 22a; Ky. Rev. Stat. § 18A.095(1) ("A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.")

litical speech and political activity of public employees (see *Pickering*, 391 U.S. at 574 ("it is apparent that the threat of dismissal from public employment is * * * a potent means of inhibiting speech")), and—as illustrated by the facts of this case—allows the imposition of *ad hoc* restrictions "aimed at particular parties, groups, or points of view" (*Letter Carriers*, 413 U.S. at 564).[15]

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[15] The mere fact that a public employer may bar public employees' political participation altogether, through a viewpoint-neutral statute such as the Hatch Act, does not mean that the employer is therefore free to selectively bar an employee's candidacy because of disagreement with that candidacy in particular. As exemplified by this Court's designated-public-forum doctrine, the greater power (to prohibit a class of activity altogether) does not always encompass the lesser power (to prohibit particular instances of such activity). Cf. *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."). Indeed, First Amendment law is rife with such holdings, which have been applied to public employees repeatedly. For example, although a State has no obligation to establish any particular cause of action, if the State does establish a certain cause of action, the Petition Clause then prevents the State from punishing a public employee who brings suit under that cause of action (at least when the suit implicates a matter of public concern). See, *e.g.*, *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1221–1222 (9th Cir. 1997) (collecting cases). Similarly, the First Amendment does not compel a legislative body to entertain public commentary during its sessions (see *Minn. State Bd. for Cmty. Colleges* v. *Knight*, 465 U.S. 271, 283–284 (1984)), but it does forbid legislatures from closing public comment sessions to government employees or their representatives once such sessions have been established (see *e.g.*, *Local 2106, Int'l Ass'n of Firefighters* v. *City of Rock Hill*, 660 F.2d 97, 100–101 (4th Cir. 1981)). Similarly here, because at-will government employees are free under Kentucky law to run for office, the First Amendment is plainly implicated when such employees

This situation likely wreaks the greatest harm at the state and local levels. In many communities, especially smaller communities, most of the people with relevant experience concerning the operations of the local government—the schools, municipal utilities, and law enforcement agencies—will be the very same public employees who, subordinate to an incumbent elected official, are currently employed by those entities. A rule like the one adopted by the Sixth Circuit, which permits that official to unilaterally shrink the pool of likely candidates by firing (or threatening to fire) any employee who decides to run for office against his wishes, can thus have a dramatic, adverse impact on the number and quality of candidates for local elective office. The employees deterred from running are not the only ones to suffer as a result. Because "[g]overnment employees are often in the best position to know what ails the agencies for which they work" (*Waters* v. *Churchill*, 511 U.S. 661, 674 (1994)), and are therefore "the members of a community most likely to have informed and definite opinions" about governmental operations (*Pickering*, 391 U.S. at 572), the general electorate suffers a significant loss by being "deprived of informed opinions on important public issues" (*San Diego* v. *Roe*, 543 U.S. 77, 82 (2004)).[16]

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are selectively punished for deciding to embrace that opportunity.

[16] The facts of this case illustrate the danger. As is presumably typical of candidacy announcements, petitioner's candidacy announcement was not simply a declaration that he intended to seek office, but also informed voters of a policy innovation that he believed would be beneficial to the community and that he intended to implement if elected. See App., *infra*, 3a; cf. *Socialist Workers Party*, 440 U.S. at 186 ("an election campaign is a

As reported cases and everyday experience make clear, the risk that a public employee will be deterred (or outright prevented) from seeking elected office by an incumbent official displeased with that employee's candidacy is not limited to situations in which the employee seeks to challenge his or her ultimate superior. In *Newcomb*, for example, the plaintiff, a deputy city attorney, was "dismissed when, against the wishes of the city attorney, he announced his intention to run for Congress." 558 F.2d at 827. See also Shawn Day, *Portsmouth Lawyer's Run for Office Cited as a Reason to Fire Him*, VIRGINIAN-PILOT, Mar. 17, 2009 (reporting the termination of an assistant district attorney who announced a decision to run for district attorney in another community and was allegedly fired because the two district attorneys are friends).

Given its pernicious effect on political speech, electoral choices, and self-governance by an informed electorate, this Court should review the decision below, which enables a public employer to punish employees on an *ad hoc* and potentially discriminatory basis for engaging in conduct that lies at the very core of First Amendment protections.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE DEEP AND PERSISTENT SPLIT AMONG THE LOWER COURTS.

Although the Court has never directly addressed the precise question presented, the Sixth Circuit's rule is, for the reasons suggested above, plainly wrong. Furthermore, right or wrong, the Sixth Cir-

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means of disseminating ideas as well as attaining political office").

cuit's rule, announced in *Carver* and reaffirmed below, is in clear conflict with decisions of four other circuits. This case is an appropriate vehicle for resolving that conflict, which has persisted for more than a decade and directly affects important federal rights.

Review in this case is appropriate because the facts of this case are simple and undisputed. Respondent admits, and the district court expressly found, that petitioner was fired solely because he announced his candidacy against respondent. See App., *infra*, 13a; see also *id.* at 4a. Similarly, there is no dispute that employees of the Bullitt County sheriff's department are in general allowed to seek elected office. Indeed, respondent admits that five employees other than petitioner were allowed to run for offices other than sheriff during the same election cycle. See Appellee's Brief at 12, *Greenwell* v. *Parsley*, 541 F.3d 401 (6th Cir. 2008) (No. 07-5694), 2007 WL 4963214. Employment disputes are seldom so neatly drawn.

The clarity of the factual record in this case makes the Sixth Circuit's refusal to revisit the *Carver* rule *en banc* all the more remarkable—especially in light of Judge Martin's express plea that the court do precisely that. See App., *infra*, 7a. It has been nearly a dozen years since *Carver* was decided. In that time, three separate panels of the Sixth Circuit have recognized the conflict between *Carver* and the decisions of other circuits. See App., *infra*, 5a–7a; *Murphy*, 505 F.3d at 450 n.1 (noting that "[o]ther Circuits have not followed Carver"); *Myers*, 216 F. App'x at 555 (acknowledging "the strength of [plaintiff's] argument and other circuits' holdings," but pronouncing itself "bound by *Carver*"). And yet each

time, despite this open and acknowledged conflict, the Sixth Circuit has denied requests that it revisit the rule *en banc*. See App., *infra*, 23a–24a (order denying rehearing *en banc*); *Murphy*, 505 F.3d at 446 (rehearing denied); *Myers* v. *Dean*, No. 06-3683 (6th Cir. Aug. 2, 2007) (order denying petition for rehearing *en banc*). The message is clear: The Sixth Circuit will not revisit *Carver* and resolve this persistent circuit split. Only this Court can do so, and it should do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

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APPENDICES

APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-5694

DAVID GREENWELL,

Plaintiff-Appellant,

v.

PAUL PARSLEY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Kentucky, John G. Heyburn II, Chief District Judge.

Argued: Philip C. Kimball, Louisville, Kentucky, for Appellant. David Paul Bowles, Landrum & Shouse, Louisville, Kentucky, for Appellee.

On Brief: Philip C. Kimball, Louisville, Kentucky, for Appellant. David Paul Bowles, Robert T. Watson, Landrum & Shouse, Louisville, Kentucky, for Appellee.

Before: Martin and Norris, Circuit Judges; Stamp, District Judge.[*]

Norris, J., delivered the opinion of the court, in which Stamp, D.J., joined. Martin, J. delivered a separate concurring opinion.

ALAN E. NORRIS, Circuit Judge.

Paul Parsley, the former sheriff of Bullitt County, Kentucky, fired deputy sheriff David Greenwell immediately after he learned through a newspaper article that his deputy intended to run against him in the next election. Greenwell responded by filing suit against Parsley and his chief deputy Mack (Jim) McAuliffe. The only federal cause of action included in the complaint was an allegation that defendants violated Greenwell's First and Fourteenth Amendment right to run for political office. The district court granted summary judgment to defendants on this claim and on various state-law claims that are not at issue on appeal. Plaintiff then filed a motion to amend pursuant to Fed. R. Civ. P. 59(e), which the district court denied. The only issue on appeal concerns whether Sheriff Parsley violated Greenwell's First Amendment right to engage in political activity. Like the district court, we hold that *Carver* v. *Dennis*, 104 F.3d 847 (6th Cir. 1997), a prior published decision of this court, controls the outcome of this case. We therefore affirm the grant of summary judgment.

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[*] The Honorable Frederick P. Stamp, Jr., Senior United States District Judge for the Northern District of West Virginia, sitting by designation.

I.

Greenwell served as a deputy in Sheriff Parsley's office from 1999 until 2005. On September 7, 2005, an article appeared in the *Louisville Courier-Journal* announcing Greenwell's candidacy for the sheriff's office:

> Republican Dave Greenwell, a Bullitt County sheriff's deputy, has filed with the Kentucky Registry for Election Finance to run. * * *
>
> * * *
>
> Greenwell has been a deputy for six years and spent eight years in the 1990s as a Bullitt County deputy jailer.
>
> He said he'd like to become sheriff and create a public relations position.
>
> A deputy in such a position, he said, would follow up with people who file police reports to make sure the department handled their complaint to their satisfaction. Doing so would hold deputies accountable and improve the department's image * * *.

While reading this announcement, Parsley highlighted the parts of the article that indicated that Greenwell was running, as well as the statements Greenwell made regarding changes he would make to the sheriff's department. Parsley summoned Greenwell to his office, and told him, "See in the paper here where you're trying to take my job." Parsley then asked him to step outside. After consulting with his attorney, Parsley emerged and handed the following termination letter to Greenwell:

> Dear Mr. Greenwell:

> This will confirm that as of September 7, 2005 you informed the public and me personally that you are running against me for Sheriff in the 2006 election. Therefore, I am terminating your employment with me and my office for obvious reasons.

Greenwell maintains that Parsley fired him not only due to his candidacy, but because Parsley was upset that Greenwell had spoken out on a matter of public concern, namely, the operation of the sheriff's department. For his part, Parsley testified, "He wanted to take my job away from me. * * * He put it in the paper he was running for sheriff—was gonna take my job."

In the end, neither man was elected sheriff. Parsley lost the Democratic primary to Donnie Tinnell, who then defeated Greenwell in the general election.

II.

We review the grant of summary judgment de novo. *Lockett* v. *Suardini*, 526 F.3d 866, 872 (6th Cir. 2008). Further, while the denial of a motion under Federal Rule of Civil Procedure 59(e) is generally reviewed for abuse of discretion, to the extent the motion seeks reconsideration of a grant of summary judgment, the denial of the motion is reviewed de novo. *Columbia Gas Transmission Corp.* v. *Limited Corp.*, 951 F.2d 110, 112 (6th Cir. 1991). Summary judgment is proper if "there is no genuine issue as to any material fact" such that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

In the *Carver* decision, upon which the district court relied in granting summary judgment to defen-

dants, a county court clerk terminated her deputy clerk the day after the deputy announced her intention to run in the next election. The deputy presented no evidence that she had been dismissed because of her political beliefs. This court characterized the issue before it in these terms:

> Stated narrowly, the issue before us is whether Carver, a deputy county clerk who was an at-will employee in a two-person office—the other person being the county clerk herself—had a First Amendment right to run against the incumbent clerk in the next election and still retain her job.

Carver, 104 F.3d at 849. While the First Amendment protects the right of public employees to speak out on matters of public concern, *id.* (citing *Connick* v. *Myers*, 461 U.S. 138, 146 (1983)), it has not been extended to candidacy alone. *Id.* at 850-851. In short, "[t]he First Amendment does not require that an official in [an employer's] situation nourish a viper in the nest." *Id.* at 853.

Since the *Carver* decision, panels of this court have both questioned the wisdom of *Carver* and sought to read it narrowly. See *Murphy* v. *Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007) ("[W]e limited our holding in *Carver* to the question of whether the First Amendment recognized a government employee's ability to run for office as a fundamental right."); *Myers* v. *Dean*, 216 Fed. Appx. 552, 554 (6th Cir. 2007) (collecting cases from other circuits in tension with *Carver*, but concluding that it continued to be the law of this circuit). Clearly, cases involving political speech by public employees proceed on a continuum; drawing a clear line between the simple announcement of a candidacy, which does not trigger

protected political speech, and an announcement coupled with speech critical of one's opponent (and boss), which does trigger constitutional protection, is not an easy task. In *Murphy*, the dissenting judge expressed the dilemma in these terms:

> I am not persuaded by [plaintiff's] argument that *Carver* can be distinguished because she was discharged not only for the fact of her candidacy but also for the manner in which she campaigned. As the district court aptly observed, this turns "on the question of whether attacking your opponent's political experience is akin to an expression of political beliefs." As I see it, saying "I am a better or more experienced candidate than my boss" is nothing more than the assertion of a rival candidacy. I believe that the only reasonable conclusion to be drawn in this case is that [plaintiff] was discharged for her rival candidacy and not on account of her political beliefs or affiliations.

Murphy, 505 F.3d at 456 (dissent). In *Murphy* the plaintiff was only terminated after a "spirited" campaign. *Id.* at 448. Furthermore, "it [was] undisputed that [defendant] terminated [plaintiff] due to her political speech during the course of the campaign." *Id.* at 449 (emphasis added). In the case before us, by contrast, Parsley terminated Greenwell at the moment that he learned of the candidacy from the newspaper. The fact that he may have highlighted certain implied criticisms of the department in the newspaper account does not transform this case into one of political speech. As Parsley unequivocally told Greenwell, "you're trying to take my job," and there is nothing in the record to belie the conclusion that

the termination was because of the candidacy. The announcement of candidacy "is nothing more than the assertion of a rival candidacy." *Id.* at 456 (dissent). In our view, this case cannot be meaningfully distinguished from *Carver*.

The judgment of the district court is **affirmed**.

BOYCE F. MARTIN, JR., Circuit Judge, concurring.

I concur separately to point out once again the weak precedential support for this Court's decision in *Carver* v. *Dennis*, 104 F.3d 847, 850-51 (6th Cir. 1997), and express my hope that our Court will revisit this critical First Amendment issue en banc.

I.

As I have noted in previous decisions, *see Murphy* v. *Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007), the holding in *Carver* was based on two decisions that do not support its final conclusion. *See* 104 F.3d at 850-51 (citing *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972), and *Clements* v. *Fashing*, 457 U.S. 957, 963 (1982)). In *Bullock*, the Supreme Court held simply that states have no obligation to permit a person's name to appear on the ballot. See 405 U.S. 134, 143 (1972). While *Clements* v. *Fashing* did uphold a law prohibiting certain elected officials from running for the state legislature, that decision expressly distinguished cases where a civil servant is the candidate. 457 U.S. 957, 972 (1982). Whether out of hostility to the First Amendment or a mere misreading of the precedent, the *Carver* decision expands these cases to find that a public employee may be terminated simply because of the fact of that employee's candidacy. This decision puts us in opposition with as

many as six other circuits, which have held that firings based on one's political candidacy do violate the First Amendment.[1] In addition, *Carver* continues to be criticized and distinguished in our own circuit, see *Murphy*, 505 F.3d at 450; *Myers* v. *Dean*, 216 Fed. Appx. 552, 553-54 (6th Cir. Feb. 9, 2007); *Becton* v. *Thomas*, 48 F.Supp.2d 747, 756 (W.D. Tenn. 1999) ("[T]he Sixth Circuit clearly had no intention of using the *Carver* case to resolve the broader question of whether the First Amendment ever provides any protection for an individual's right to run for political office."). Clearly, the time to re-visit *Carver* has come.

Still, like a stray cat that hangs around the door and infests the house with fleas, this decision con-

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[1] See *Finkelstein* v. *Bergna*, 924 F.2d 1449, 1453 (9th Cir.), cert. denied, 502 U.S. 818 (1991). See also *Stiles* v. *Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (recognizing "the right to run for public office"), cert. denied, 499 U.S. 919 (1991); *Flinn* v. *Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) ("[H]e certainly had a constitutional right to run for office and to hold office once elected ...."), cert. denied, 476 U.S. 1116 (1986); *Washington* v. *Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) (recognizing "[t]he [F]irst [A]mendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate"), cert. denied, 457 U.S. 1120 (1982); *Newcomb* v. *Brennan*, 558 F.2d 825, 829 (7th Cir.) (holding that the "plaintiff's interest in running for Congress and thereby expressing his political views without interference from state officials ... lies at the core of the values protected by the First Amendment"), cert. denied, 434 U.S. 968 (1977); *Magill* v. *Lynch*, 560 F.2d 22, 27 (1st Cir. 1977) ("It appears that the government may place limits on campaigning by public employees if the limits substantially serve government interests that are important enough to outweigh the employees' First Amendment rights."), cert. denied, 434 U.S. 1063 (1978).

tinues to plague this Court's jurisprudence.[2] As such, we are bound by its conclusion, and I concur in the judgment of the Court.

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[2] But the cat came back the very next day / The cat came back; we thought he was a goner / But the cat came back—it just wouldn't stay away. *The Cat Came Back*, Harry S. Miller (1893).

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:05-CV-768-H.

DAVID GREENWELL,
Plaintiff,

v.

PAUL PARSLEY
AND
MACK (JIM) MCAULIFFE,
Defendants.

MEMORANDUM OPINION AND ORDER

May 8, 2007

JOHN G. HEYBURN, II, Chief Judge.

Plaintiff David Greenwell, former deputy sheriff of Bullitt County, filed suit against the former sheriff, Defendant Paul Parsley, for termination of employment in violation of his federal civil rights and Kentucky law. Parsley had fired Greenwell after learning that Greenwell was running against him for

his position as sheriff in the upcoming election. On January 22, 2007, the Court sustained Defendant's motion for summary judgment. On January 31, 2007, Plaintiff moved to vacate that judgment.

Fed. R. Civ. P. 59(e) encompasses motions to vacate judgments. *Foman* v. *Davis*, 371 U.S. 178, 181 (1962); *Huff* v. *Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). The decision to grant such a motion is within the sound discretion of the trial court. *Huff*, 675 F.2d at 122. The Sixth Circuit Court of Appeals has determined, however, that a court should grant such a motion only "if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *GenCorp, Inc.* v. *Am. Int'l Underwriters Co.*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted).

Here, Plaintiff essentially claims that the Court's analysis represents a clear error of fact and law. The Court has fully discussed the facts in its recent Memorandum Opinion and there is little need to repeat them here. On the other hand, Plaintiff has made quite reasonable objections which have caused the Court to thoroughly review its original analysis. In the end, the Court concludes that its original analysis was sound. The Court adds the following thoughts.

I.

Plaintiff has reiterated his concerns about the scope of the Sixth Circuit decision in *Carver* v. *Dennis*, 104 F.3d 847 (6th Cir. 1997) as this Court has defined it here. Plaintiff contends that by granting Defendant's motion for summary judgment, the Court misapplied *Carver*. In that case, the defendant

county clerk fired the plaintiff from her position as deputy county clerk solely because she announced her candidacy against the defendant in the upcoming election. *Id.* at 848. The *Carver* court held that termination of the plaintiff's employment upon her announced candidacy for her superior's position did not violate any First Amendment free speech or associational right, absent some allegation that the dismissal was motivated by the deputy county clerk's political beliefs, expressions, affiliation, partisan political activity, or expression of opinion. *Id.* at 851. The Sixth Circuit said that there is no fundamental right to express one's political views through candidacy. *Id.* at 850-51.

Plaintiff tries to distinguish his case from *Carver* on three grounds. While *Carver*'s application here is not absolutely clear, the Court continues to respectfully disagree with Plaintiff's narrow view.

A.

First, Plaintiff says that his evidence is different than in *Carver*. Greenwell alleges that, unlike the plaintiff in *Carver* who was discharged solely for the fact of her announced candidacy, he was terminated for the additional reasons of having criticized Parsley's administration and changed party affiliation. Plaintiff may make such an assertion, but he also "bears the initial burden of proving that he or she was discharged because of his or her political affiliation." *Hall* v. *Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). In *Carver*, plaintiff conceded the sole reason for his termination; here, the evidence requires the same conclusion. Although Plaintiff argues otherwise, he points to no additional facts of which the Court was not already aware. His arguments to the

contrary are based on speculation, rather than evidence.

In some cases, the reason for an at-will employee's termination can be a relatively difficult and often disputed issue of fact. Here, the evidence is otherwise. Parsley terminated Greenwell on the same day the Courier-Journal and The Pioneer News published pieces on Greenwell's bid as Republican for Bullitt County Sheriff. The evidence seems clear. Parsley called Greenwell into his office after learning of Greenwell's election bid.[1] Parsley began that meeting by stating: "See in the paper here where you're tryin' to take my job." The whole thrust of that conversation concerned whether Greenwell was in fact running against Parsley for sheriff. In his typed statement, which was presumably written as part of his election campaign and has been submitted as an exhibit with his motion to dismiss, Greenwell further indicates that the sole reason he was fired was because he was trying to take Parsley's job as sheriff:

> On September 7, 2005 while responding to a burglary in our county, I was summoned to the office of the sheriff. The sheriff Paul Parsley called me into his office and placed a copy of the Courier Journal [*sic*] newspaper in front of me. Highlighted was an article that contained statements that I had made about my intensions [*sic*] to run for the office of sheriff and changes that I would like to see for Bullitt County.

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[1] The meeting was taped via a recorder on Sheriff Parsley's desk.

> I was immediately fired! Sheriff Parsley stated to me that he should not have to pay me to try and take his job.

Parsley further testified that the reason he fired Greenwell was because "he wanted to take my job away from me." Greenwell presents no evidence to counter this stated and obvious reason. That the firing arose from other reasons, such as his change of party affiliation or his disagreement about policies, is merely Plaintiff's speculation. As the court held in *Carver*, seeking election against a person's boss for his job is an act of insubordination not protected by the First Amendment. 104 F.3d at 851.

B.

Plaintiff next argues that *Carver* does not apply because the plaintiff there was defendant's only employee, whereas Greenwell was one of thirty-seven deputy sheriffs. Plaintiff suggests that the *Carver* rule can only apply in a small office setting. This Court does not believe that this is so.

In support of his argument, Plaintiff incorrectly states that the *Carver* court applied the "balancing test" set forth in *Donlin* v. *Watkins*, 814 F.2d 273, 277 (6th Cir. 1987). However, the Sixth Circuit in Carver did not use the *Pickering* balancing test used in *Donlin*. *Carver*, 104 F.3d at 847. Although the lower court had used the *Pickering* balancing test, the Sixth Circuit explicitly held that *Pickering* did not apply because the basis for the plaintiff's discharge was solely the fact that she was trying to take the job of her employer. *Id.* Insubordination in seeking his boss's position was not a constitutional right of the plaintiff, so the court need not apply the balancing test. The Court believes that the same is true

here. Because Greenwell was fired solely for seeking his boss's position, *Pickering* does not apply, and this Court need not examine whether a close working relationship existed that would afford the sheriff a wide degree of deference in his firing decisions.

C.

Finally, Greenwell contends that *Carver* does not apply because it involved a nonpartisan election in which the candidates were directly opposed to one another; whereas, in this case, the candidates were running for office from different political parties. Therefore, Plaintiff argues, Parsley and Greenwell were not in direct opposition to one another in the primary elections and *Carver* should not apply. The Court is unpersuaded by this argument. Greenwell's intention, regardless of the necessary steps to achieve it, was to unseat Parsley. By declaring his bid for the election, Greenwell announced his intent to compete with his boss for his position. Such an action is an act of insubordination not protected by the First Amendment, and Parsley legally terminated Greenwell's employment.

II.

Any time an employee announces his candidacy against his boss, such an action constitutes either a public policy or political statement. However, *Carver* says that the First Amendment does not protect such candidacy statements. Even if Greenwell had presented evidence of some history of disagreement between himself and Parsley, the result here would not change. Parsley did not act until Greenwell expressed his policy or political views by filing for office. On our facts, it is certain that Parsley acted because Greenwell filed for office against him and not

for any other reason. There is certainly room for argument about the *Carver* doctrine. However, if Greenwell is allowed to proceed to trial on this evidence, then the *Carver* rule means very little. For all these reasons, the Court will not give *Carver* such a narrow reading. The Court maintains its view that a reasonable reading of *Carver* requires dismissal of this case.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff David Greenwell's motion to vacate is DENIED.

This is a final order.

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:05-CV-768-H.

DAVID GREENWELL,
Plaintiff,

v.

PAUL PARSLEY
AND
MACK (JIM) MCAULIFFE,
Defendants.

MEMORANDUM OPINION

January 22, 2007

JOHN G. HEYBURN II, Chief U.S. District Judge.

Plaintiff, David Greenwell, was a deputy sheriff of Bullitt County; Defendant, Paul Parsley, was the Sheriff of Bullitt County. Greenwell alleges that Parsley terminated his employment in violation of his federal civil rights under 42 U.S.C. § 1983 and § 1985 and in violation of his rights under Kentucky

law. Parsley says that he terminated Greenwell because Greenwell had announced his intention to seek Parsley's job in the upcoming election. Discovery is now complete and both Defendants have moved for summary judgment.[1]

I.

Prior to becoming deputy sheriff under Defendant Parsley, Greenwell worked as Bullitt County Deputy Jailer. Greenwell was appointed a Deputy Sheriff in Bullitt County in January of 1999. Parsley has worked in some capacity with the Bullitt County Sheriff's office since 1978. Parsley was elected Bullitt County Sheriff in 1998 and took office in 1999. Although Greenwell was a Democrat when he began working for Sheriff Parsley in 1999, he recently switched parties and is now a registered Republican.

On Wednesday, September 7, 2005, the Courier-Journal published an article chronicling Greenwell's intent to run as the Republican candidate for Sheriff and his filing with the Kentucky Registry for Election Finance. On the same day, in The Pioneer News, an editorial was published also discussing Greenwell's bid as a Republican for Bullitt County Sheriff.

On that same day, Parsley called Greenwell into his office and told him that he was terminated. Parsley told Greenwell that he had read in the paper about Greenwell's political plans. Parsley has stated that his reason for terminating Greenwell was because "he wanted to take my job away from me." Later that same day, Greenwell's cousin, Mack

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[1] In his response, Greenwell agreed to dismiss all claims against another Defendant, Mack McAuliffe and the claims against both Defendants under 42 U.S.C. § 1985.

McAuliffe related to Greenwell that he thought he had made a mistake. He said that Greenwell should apologize to the Sheriff and withdraw his bid, in the hopes Sheriff Parsley would restore his job. Greenwell told Mack that he had every right to his opinions.

After his termination, Greenwell applied for a job as Deputy Sheriff in Nelson County. He began to work in Nelson County in January of 2006. When Greenwell showed up to meet with Sheriff Newton of the Nelson County Sheriff's Department, Sheriff Newton acted as if he did not know Greenwell, gave Greenwell "the runaround" and had given the position to somebody else. Shortly thereafter, Greenwell went to Shepherdsville to pass out campaign fliers and ran into former Chief Deputy of the Bullitt County Sheriff's Office, Larry Hawkins. Mr. Hawkins asked Greenwell if the rumors were true regarding Parsley thwarting Greenwell's attempts to get a new job. Greenwell mentioned the incident which had just occurred with Sheriff Newton in Nelson County and Mr. Hawkins informed him that he had heard Parsley told Sheriff Newton that Greenwell was a "trouble maker and lazy and no count" and to do himself a favor and not hire Greenwell.

Greenwell prevailed in the primary election for the Republican candidate for Sheriff on May 16, 2006. Parsley ran against Donnie Tinnell, former Louisville and Shepherdsville police officer, in the primary elections. Mr. Tinnell prevailed as the Democratic candidate on the same date. Ultimately, Greenwell defeated Tinnell in the general election of 2006.

II.

Greenwell says that he was speaking out on issues of public concern and that he was fired for doing so. The problem here is that Greenwell chose to express his political views by running for the political office held by his boss. The question then presented is whether Parsley fired Greenwell for expressing his political beliefs in a certain manner or because Greenwell decided to challenge Parsley for his current job. The evidence shows beyond any doubt that Greenwell expressed his views by running for office. Under these circumstances, *Carver* v. *Dennis*, 104 F.3d 847 (6th Cir. 1997) governs our case and requires dismissal.

In *Carver*, the Sixth Circuit held that the First Amendment free speech and associational rights do not protect the deputy clerk's right to run for office against her boss. *Id.* at 853. The Court distinguished between expressing one's political views by speaking on issues or supporting a particular candidate as compared to actually attempting to take over an office, which the court viewed as an act of insubordination. *Id.* at 851-53. The facts of our case fall squarely in line with *Carver*.

The Court can find no evidence suggesting that Greenwell was dismissed based on his political beliefs, his political affiliations or due to patronage concerns. All of the evidence points to the conclusion that Parsley was upset that his own employee would enter a political race against him and that he fired Greenwell for that reason. Thus, it was not a dismissal based on politics at all, except to the extent that running for public office is a political exercise in a broad sense. *Id.* at 850.

The Court is not persuaded by Greenwell's attempts to distinguish *Carver* from our facts. Under *Carver* the First Amendment is deemed not to protect actions which are less akin to the exercise of political speech and more like an act of direct insubordination. Certainly, Greenwell's actions fall into the latter category. In *Carver*, both sides agreed that the plaintiff was terminated because she tried to oust her boss, not because of any particular political view. Similarly, Greenwell presents no actual evidence he was communicating any particular expression or that Parsley opposed any particular viewpoint. What Parsley opposed was the political act of Greenwell seeking his defeat at the polls. The record permits no escape from the fact that Greenwell, like *Carver*, was fired because he filed for announcing his intention to take his boss's office. *See id.* at 853.

Greenwell likens his claim to that in *Heggen* v. *Lee*, 284 F.3d 675 (6th Cir. 2002). In doing so, Greenwell seems merely to make the legal argument that conducting a personal political campaign against one's boss is the same as speaking out on an issue of public concern. The Court disagrees with Greenwell's view of the law and a review of *Heggen* confirms this. In *Heggen*, the Sixth Circuit held that a deputy sheriff could not be terminated on the grounds of his political affiliation. The court confirmed that the discharge of an employee for patronage reasons alone, such as the failure to support a party of the sheriff in a recent election, did raise First Amendment concerns. *Id.* at 680. The instant case, however, presents a deputy sheriff going far beyond the mere expression of a political viewpoint to the point of personal insubordination. Therefore, the rule in *Heggen* does not control.

The evidence is absolutely clear that Parsley fired his deputy, Greenwell, because the deputy chose to enter a political campaign to oust his boss from office. Greenwell certainly had a right to run for office. However, the First Amendment does not provide constitutional cover for him to do so against the very person who hired him and supervised him.

III.

The Court will also discuss Greenwell's state law claims. Greenwell's wrongful termination claim fails for essentially the same reasons as his First Amendment claims. All of the evidence points to Greenwell's decision to run for the political office held by his boss as the factor leading to his termination. KRS 95.017 protects all manner of political activity of uniformed employees. However, that statute does not protect a person who seeks personally to unseat his boss.

Greenwell has no claim under KRS 15.520, because deputy sheriffs are designated as at-will employees under KRS 70.030(1). The Court concludes that this specific statute governs the employment and removal of deputy sheriffs under Kentucky law. Finally, the outrage claim is dismissed because Parsley's actions fall far short of the kind of outrageous or emotionally damaging conduct required to support such a claim.

The Court will enter an order consistent with this Memorandum Opinion.

APPENDIX D

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-5694

DAVID GREENWELL,

Plaintiff-Appellant,

v.

PAUL PARSLEY,

Defendant-Appellee.

January 26, 2009

Before: Martin and Norris, Circuit Judges; and Stamp,[*] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

---

[*] Hon. Frederick P. Stamp, Jr., United States District Judge for the Northern District of West Virginia, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green

Clerk

(2)

No. 08-1328

Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DAVID GREENWELL,

Petitioner,

v.

PAUL PARSLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

On September 7, 2005, articles appeared in local Kentucky newspapers discussing petitioner David Greenwell's intention to run for the position of Sheriff of Bullitt County, Kentucky. Petitioner, a Bullitt County Deputy Sheriff, met with respondent Paul Parsley, the Bullitt County Sheriff, that day. Respondent confirmed that petitioner was running for the office of Bullitt County Sheriff, a position held by the respondent. Respondent terminated petitioner's at-will employment that day due solely to petitioner's attempt to take respondent's job away from him.

The very narrow question presented by this case is whether the petitioner is entitled to First Amendment protection for announcing his intention to take his boss' job, and whether the respondent is thus entitled to qualified immunity as a matter of law as the petitioner cannot show a violation of clearly established law in this instance.

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STATEMENT

This case presents a very narrow issue that is neither in tension with this Court's decisions, nor creates any conflict among the circuits. Instead of addressing the singular, narrow issue of whether the First Amendment even provides protection for the conduct of an insubordinate, at-will employee announcing his intention to take his boss' position, the petitioner instead argues from a faulty premise completely unsupported by any record evidence. There is not a shred of evidence in this case that petitioner's termination was caused by, or attributable to, political patronage, the exercise of a political belief, affiliation, or association, or the exercise of any free speech right. Moreover, contrary to petitioner's claim, the Sixth Circuit has not granted "public employers unchecked authority to fire any subordinate who decides to seek elected office." (Pet. for Writ, p. 3). That is not what occurred in this case, and that is not what the Sixth Circuit even remotely held. The issue is not as broad or conflicted as petitioner wants this Court to believe. This case does not involve a public employee being terminated due to the exercise of some perceived right to political participation itself, or a termination for the support of a particular candidate or political belief. Rather, this case involves a public employee terminated for announcing his intention to oust his boss.

The petitioner's arguments are unpersuasive. No evidence exists of a political patronage, expression or belief dismissal. Thus, on the narrow issue presented to the Court, there is no "tension" or "conflict" with existing precedent. No free speech analysis need be employed when, as a matter of law, the First

Amendment cannot be used to protect the petitioner from what was a legal and proper public employment dismissal. The Sixth Circuit properly affirmed summary judgment in this matter, and the Petition for Writ of Certiorari should be denied.

A. Factual Background

Petitioner was hired by the respondent as a deputy sheriff in January, 1999. (Greenwell's Depo., p. 24, Apx., p. 35).[1] In that capacity, he performed general patrol duties in Bullitt County, Kentucky. (*Id.*). Immediately prior to his employment by respondent, the petitioner worked as a Bullitt County Deputy Jailer. (*Id.* at p. 25). However, petitioner did not want to work for newly elected Bullitt County Jailer Danny Fackler, so he sought and accepted an appointment by the respondent as deputy sheriff. (*Id.* at p. 27). This dislike of Jailer Fackler did not dissipate. Petitioner filed and ran against Fackler in the 2002 primary election in Bullitt County, losing to Fackler. (*Id.* at p. 28). While respondent discouraged petitioner from running against Jailer Fackler, and told him that he would rather he not do so, petitioner retained his position as a deputy sheriff and did not lose any income during his unsuccessful run for Jailer of Bullitt County. (Parsley Depo., p. 24, Apx., p. 35; Greenwell's Depo., p. 29, Apx., p. 40).

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[1] Please note respondent's hereinafter reference to "R." refers to the district court's record, reference to "Apx." refers to the Joint Appendix filed with the Sixth Circuit Court of Appeals, while reference to "Pet. App." refers to the Appendices as presented in the Petition for Writ of Certiorari as stated therein.

On September 7, 2005, an article appeared on the opinion page of the *Pioneer News* newspaper. In that article, while writing about the upcoming election for Bullitt County Sheriff, columnist Thomas Barr wrote, "Incumbent Paul Parsley is making another run at the office. Republican David Greenwell, who is currently a deputy with Parsley, is also rumored to be making a bid." (Greenwell's Depo., Exhibit 1, Apx., p. 28). That morning, petitioner was summoned to appear in respondent's office. (*Id.* at p. 46, Apx., p. 49). The meeting was taped via a recorder on respondent's desk, and the following conversation between petitioner and respondent occurred:

Sheriff:	See in the paper here where you're tryin' to take my job.
Greenwell:	Oh, I looked for it and I didn't see it. I didn't think it was in there.
Sheriff:	It's in there.
??:	(?) for sure.
	Hmm-hmm.
Sheriff:	That's all I need to know.
Greenwell:	Could I see it, cause I couldn't see it. I wanted to talk to you and I tried but I was told very plainly that you didn't want to talk to me then or ever about anything.
Sheriff:	I haven't, my door's always been open to anybody want to talk to me but. . .,

Greenwell: Uh, you know, I mean and the whole thing, I was honest with you as I can be, the whole thing is, you know I always try to forgive and forget, try to reason out in my own mind why things happen or why the way they are, uh, tremendous amount of things that you don't know about that's went on, a lot of hardships that was put on me, lately, not recently lately but in the recent past and then with the last election and everything, uh, you know how that went, you know what was said.

Sheriff: You put this department in a hell of a shape there trying to run for jailer when you're working for here. You put this department in jeopardy because people think that the sheriff tryin' to take over everything. But that's all I need to know. Go on now. You all wait on outside there for me.

(Transcript of September 7, 2005 Conversation, Apx., p. 27).

Respondent then terminated petitioner's employment as a deputy sheriff, effective September 7, 2005. (Greenwell's Depo., Exhibit 2, Apx., p. 29). Respondent terminated petitioner because "he wanted to take my job away from me." (Parsley Depo., p. 12, Apx., p. 88). For his part, petitioner was concerned that he had made the biggest mistake of his law

enforcement career. (Greenwell's Depo., p. 49, Apx., p. 52).[2]

B. Proceedings Below

On November 16, 2005, petitioner filed the instant lawsuit alleging (1) unlawful patronage dismissal by the respondent in violation of 42 USC § 1983; (2) conspiracy to violate his civil rights in violation of 42 USC § 1985; (3) common law wrongful discharge under Kentucky law; (4) violation of KRS § 15.520; and (5) outrage under Kentucky common law. After discovery closed in this matter, the respondent moved for summary judgment on all of the petitioner's claims based on. (R. 11, Motion for Summary Judgment).[3]

On January 22, 2007, the district court applied the Sixth Circuit's directly on-point decision of *Carver v.*

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[2] Petitioner never was the subject of any discipline or citizen complaints while employed at the Bullitt County Sheriff's Office. (Parsley Depo., p. 11, Apx., p. 87). It is undisputed that petitioner won the Republican primary election for Bullitt County Sheriff on May 16, 2006, and that respondent was defeated in his bid for re-election in the Democratic primary election the same date. Petitioner lost the general election for Bullitt County Sheriff.

[3] In response to summary judgment, the petitioner chose to voluntarily dismiss co-Defendant Mack (Jim) McAuliffe from the action (R. 13, Response to Motion for Summary Judgment, p. 1). The petitioner also conceded and dismissed his claim of conspiracy under 42 U.S.C. §1985. (*Id.*, pp. 1-2). Thus, the remaining claims before the district court were those against the respondent in his individual and official capacity as Sheriff of Bullitt County, Kentucky for an alleged violation of petitioner's First Amendment rights, and state law claims of wrongful discharge, violation of KRS §15.520, and outrage.

Dennis, 104 F.3d 847 (6th Cir. 1997) and granted respondent's summary judgment, stating in no uncertain terms that it could "find no evidence suggesting that Greenwell was dismissed based on his political beliefs, his political affiliations or due to patronage concerns." (Pet. App., p. 20a). Moreover, the district court held petitioner's dismissal was not "based on politics at all" and that petitioner had failed to present "actual evidence he was communicating any particular expression or that Parsley opposed any particular viewpoint." (*Id.* at pp. 20a-21a). Ultimately, the district court ruled that the undisputed record evidence permitted "no escape from the fact" that petitioner, like the plaintiff in *Carver*, was terminated for announcing his intention to take his boss' job. (*Id.* at p. 21a). "Greenwell certainly had a right to run for office. However, the First Amendment does not provide constitutional cover for him to do so against the very person who hired him and supervised him." (*Id.* at p. 22a).

On May 8, 2007, the district court denied petitioner's motion to vacate summary judgment, ruling petitioner could not offer any evidence, absent mere speculation, that his termination was caused by political patronage, affiliation or association. (Pet. App., p. 14a). More to the point, petitioner could not offer any evidence that his termination was caused by the exercise of a free speech right, since seeking to oust one's boss from his position "is an act of insubordination not protected by the First Amendment." (*Id.*). Thus, contrary to petitioner's assertion, because the undisputed record evidence showed petitioner was terminated "solely for seeking his boss' position," the First Amendment was not even implicated in this instance and thus the district court

was not required to apply a free speech balancing test as set out in *Pickering v. Board of Ed.*, 391 U.S. 563 (1968) and its progeny. (*Id.* at pp. 14a-15a).

The petitioner noticed his appeal to the Sixth Circuit, appealing only the dismissal of his federal claims against the respondent under the First and Fourteenth Amendments. On September 2, 2008 the Sixth Circuit affirmed the district court's grant of summary judgment. (Pet. App., pp. 1a-9a). In that opinion, applying *Carver* the Sixth Circuit ruled the sole reason for petitioner's termination was his attempt to take respondent's job. (*Id.* at p. 6a). There was no evidence petitioner was fired for exercising any political speech, or fired for exercising some right to political participation itself. (*Id.*). Rather, and quite simply, this termination was due solely to petitioner's insubordinate conduct seeking to remove and replace his superior. (*Id.*).

This Petition then followed.

REASONS FOR DENYING THE PETITION

The case and legal issues described in the Petition bear little resemblance to the case actually litigated and decided by the courts below. As stated above, the premise of petitioner's arguments in this matter is flawed. Arguing from the false assumption that this is a political participation or patronage case, the petitioner spends a considerable amount of time attempting to convince the Court that the Sixth Circuit's holding creates "tension" with free speech precedent, that this holding will create confusion and division among the circuits on the issue of political

participation, and that as a matter of public policy the holding cannot stand.

Respectfully, the issue is not one of political participation. On the very narrow issue of whether First Amendment protection even extends to the insubordination of a public employee stating his desire to take his boss' job, the district court and Sixth Circuit's rulings are not in "tension" with any of this Court's decisions, no split among the circuits will result, and public policy does not dictate otherwise.

The district court and Sixth Circuit correctly applied the law without wading into unsupported legal issues or entertaining mere speculation. The courts' careful resolution of this narrow issue - performed twice by the district court - does not implicate any circuit split. As it is obvious the district court and Sixth Circuit addressed a narrow, and in many respects, unique issue, petitioner's cited cases are clearly inapplicable. Specifically, as the undisputed evidence shows, petitioner's dismissal was not based on politics at all, nor could petitioner present any evidence he was communicating a particular expression or that the respondent opposed any viewpoint of the petitioner. Quite simply, petitioner could not offer any evidence, absent speculation, that his termination was caused by political patronage, affiliation or association. Contrary to petitioner's oft-repeated criticism, neither court was required to apply any free speech balancing test in this matter since the undisputed record evidence showed petitioner was terminated solely for seeking to oust his superior. The First Amendment has not been implicated in this case. Petitioner's arguments should be disregarded as an

attempt to turn this case into something it clearly is not, and for which there exists no evidence to support.

Finally, even assuming this case does, in fact, address the right to political participation itself, which there is no evidence to support, respondent is still entitled to qualified immunity as a matter of law. Even if petitioner's First Amendment rights were violated, it was not clearly established as of the date of petitioner's termination that dismissal of a public employee for attempting to take his boss' job was constitutionally prohibited. In fact, the law of the circuit as of the date of petitioner's termination dictated that such a dismissal was constitutionally permissible.

I. THE DISTRICT COURT AND SIXTH CIRCUIT'S HOLDINGS ARE NOT IN TENSION OR DIRECTLY CONFLICT WITH THIS COURT'S DECISIONS OR THE DECISIONS OF OTHER CIRCUITS.

A. The Lower Courts Decided This Matter Correctly Based Upon *Carver v. Dennis*.

The substance of petitioner's claims is that the respondent terminated his employment based on "political patronage, political association, and freedom of speech and the press." (R.1, Complaint, ¶ 13, Apx., p. 8). Moreover, the petitioner alleged in his Complaint that he "was never informed of, nor was there any other cause for his dismissal other than his political patronage concerning the 2006 election." (*Id.* at ¶ 12, Apx., p. 8). The proof in this case has proved both of these allegations blatantly false.

First, it is unequivocal that respondent informed petitioner that he was terminating his employment because he announced, and confirmed, that he was running against respondent in the 2006 election. (Greenwell's Depo., Exhibit 2, Apx., p. 29). During the meeting between respondent and petitioner in respondent's office on September 7, 2005, respondent was very specific - he was speaking to petitioner about what he had read in the morning paper, and wanted to confirm whether petitioner intended to run and try to take his job. Petitioner's attempts to otherwise characterize respondent's words or intent are unsupported by the record evidence. As the district court correctly observed, "[t]he evidence is absolutely clear that respondent fired his deputy, petitioner, because the deputy chose to enter a political campaign to oust his boss from office." (Pet. App., p. 22a). In fact, respondent had *five* other employees running for elective office other than Bullitt County Sheriff during the *2006* primary, and *none* suffered any adverse employment action, just like petitioner in 2002. (Parsley Depo., pp. 19-20, Apx., p. 95-96). The difference in this case is that petitioner chose to run for the position held by respondent, for the office of Bullitt County Sheriff.

Nothing in controlling federal First Amendment decisions requires a public officeholder to "nourish the viper in the nest." *Carver v. Dennis*, 104 F.3d at 853. In *Carver*, a deputy county clerk was terminated from employment after announcing her intention to run for the office held by her boss. As in this case, the deputy clerk would not have been fired had she not announced and confirmed her intention to run in the race. The ultimate question for the Sixth Circuit in *Carver* was whether the plaintiff "had a First Amendment right to

run against the incumbent clerk in the next election and still retain her job." *Id.* at p. 849. The *Carver* court examined whether the dismissal was based on political beliefs or affiliations. *Id.* at p. 850. The Sixth Circuit held that a discharge based solely on the fact that the plaintiff was trying to take the job of her employer did not violate any First Amendment rights under the federal constitution. *Id.* at pp. 850-852.

Carver presented a matter of first impression for the Sixth Circuit at the time it was decided. *Id.* at p. 852. The court noted, as in the instant matter, that no other employee was running for the office held by the employer, but that the evidence only showed the plaintiff was fired for trying to take the clerk's job. *Id.* As in *Carver*, petitioner in this case committed an act of insubordination, i.e., declaring his candidacy against respondent. *Id.* at p. 853. No speech issues arise under the circumstances of petitioner's termination that would require this Court to conduct any analysis under other First Amendment jurisprudence, despite petitioner's arguments to the contrary. Quite simply, any such speech, association, or political affiliation arguments are simply the last-ditch efforts of an insubordinate deputy sheriff who realized he had made an error in judgment. For these reasons the Petition should be denied.

B. There Exists No Evidence Petitioner Was Terminated For Exercising Political Speech.

The majority, if not all of the present Petition, concerns itself with analysis of political participation and free speech in the context of the First Amendment. For the reasons set forth herein, this analysis is not

only inapplicable, it is not even triggered by the facts as presented here. The petitioner assumes he was terminated for holding political views different from those of his employer, or that he was denied some perceived right to political participation, but fails to provide any evidence, any testimony, any documentation which would support the same. Respondent respectfully submits that through the course of this matter, including this Petition, petitioner's allegation of discharge based upon his political patronage or association, or exercise of free speech, is false. First, it is undisputed respondent informed the petitioner he was terminating his employment because the petitioner announced, and confirmed, that he was running against respondent in the 2006 election. At no point during their September 7, 2005 meeting, and more importantly at no point during the course of discovery in this action, is there any evidence respondent terminated the petitioner based upon the petitioner's political affiliation or association. Respondent testified he terminated the petitioner because "he wanted to take my job away from me." (Parsley Depo., p. 12, Apx., p. 88). Again, respondent testified he had *five* other employees running for elective office other than Bullitt County Sheriff during the 2006 primary, and *none* suffered any adverse employment action. (*Id.* at pp. 19-20, Apx., pp. 95-96). On the other hand, petitioner can only speculate as to what was in respondent's mind when he made his decision. There is *no* dispute as to what respondent testified concerning the basis for his decision - he wasn't going to pay petitioner to try to take his job from him.

Absent his bald allegations, this case has nothing to do with political patronage or participation, nor is it

even a free speech case, thus there is no "tension" with any of this Court's political speech cases as cited in the Petition. If the petitioner is to convince this Court that this case has anything to do with political speech, it is his burden to do so as the petitioner bears the initial burden of proving that he was discharged because of that political speech. *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675 (1996) ("To prevail, [in a First Amendment retaliation action] an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination."); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 80 (1990) (Stevens, J., concurring) (quoting *Illinois State Employees Union, et al. v. Lewis*, 473 F.2d 561, 567 (7th Cir. 1972). *See also Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). The record is completely devoid of any evidence that petitioner's dismissal was for any reason other than his desire to run against respondent in the 2006 election, an insubordinate decision of an employee to take his boss' job. As the undisputed facts of this case show, the petitioner's right to run for office, party affiliation, as well as his allegation that such affiliation prompted his dismissal, are nothing short of a red herrings. Dismissal of an employee for insubordination is both proper and reasonable as a matter of law under *Carver*.

Instead of directly addressing this very narrow issue, the petitioner instead attempts to confuse the issue arguing that *Pickering* and its progeny, and the respective free speech balancing tests those cases set out, should have been employed, and that in failing to apply these tests, the district court and Sixth Circuit's holdings stand in "tension" with this Court's free speech precedent. (Pet. for Write, pp. 13-16). This is

incorrect. Yet again, the traditional First Amendment analysis is not applicable to this matter for the simple reason that the First Amendment is not implicated where an at-will public employee is terminated for insubordination and there is no evidence to prove otherwise. Glossing over the issue of insubordination in favor of a full *Pickering* free speech analysis - in a case that has nothing to do with free speech - clearly shows the weakness of petitioner's argument. It must not be forgotten that it is an undisputed fact that the *only* reason respondent terminated the petitioner was because petitioner was attempting to take his job. The district court took note, stating:

> In some cases, the reason for an at-will employee's termination can be a relatively difficult and often disputed issue of fact. Here, the evidence is otherwise. Parsley terminated Greenwell on the same day the Courier-Journal and The Pioneer News published pieces on Greenwell's bid as Republican for Bullitt County Sheriff. The evidence seems clear. Parsley called Greenwell into his office after learning of Greenwell's election bid. (Footnote omitted). Parsley began that meeting by stating: "See in the paper here where you're tryin' to take my job." The whole thrust of that conversation concerned whether Greenwell was in fact running against Parsley for sheriff. In his typed statement, which was presumably written as part of his election campaign and has been submitted as an exhibit with this motion to dismiss, Greenwell further indicates that the sole reason he was fired was because he was trying to take Parsley's job as sheriff:

> On September 7, 2005 while responding to a burglary in or county, I was summoned to the office of the sheriff. The sheriff Paul Parsley called me into his office and placed a copy of the Courier-Journal [sic] newspaper in front of me. Highlighted was an article that contained statements that I had made about my intensions [sic] to run for the office of sheriff and changes that I would like to see for Bullitt County. I was immediately fired! Sheriff Parsley stated to me that *he should not have to pay me to try to take his job*.

> Parsley further testified that the reason he fired Greenwell was because "he wanted to take my job away from me." Greenwell presents no evidence to counter this stated and obvious reason.

(Pet. App., pp. 13a-14a)(Emphasis added).

In petitioning this Court, the petitioner seems to have forgotten this admission, or at the very least has ignored it, asserting issues and cases that have no application to the present matter.

It should be pointed out that the respondent does not argue the petitioner does not have a right to run for political office. Yet the law does not require respondent to suffer the insubordination of an employee whom he has hired as his deputy while waiting to see if it would not be disruptive. He correctly construed petitioner's actions as insubordinate, and petitioner cannot cite to any

authority for the proposition that respondent, or any elected official, should suffer through an election campaign paying an employee to oust him from office. Rather, as the courts below opined, respondent had every right to oust petitioner and not feed the viper in *his* nest. The right to run for political office is determined by state and federal law, but this right is simply immaterial to the claims set forth in this litigation. As the district court pointed out, petitioner "certainly had a right to run for office. However, the First Amendment does not provide constitutional cover for him to do so against the very person who hired him and supervised him." (Pet. App., p. 22a). The ultimate and narrow question for the district court and Sixth Circuit was whether petitioner's attempt to take his boss' job was protected under the First Amendment via § 1983. *Carver* answered this question directly and succinctly, and thus the Petition should be denied.

C. There Exists No Direct Conflict With Other Circuits.

In further support of his Petition, the petitioner falsely claims that the district court and Sixth Circuit's holdings directly conflict with the decisions of other circuits. (Pet. for Writ, pp. 20-24). Specifically, the petitioner claims that these holdings have "confused" the issue, "leading to results that are unpredictable and at times perverse." (*Id.* at p. 20). Respectfully, and as will be more fully set out below, petitioner has incorrectly applied these circuit decisions in an effort to achieve a desired result, and in some respects, most of petitioner's cases fail to even stand for the proposition for which they are cited.

To begin, and as stated above, petitioner's premise is completely flawed as this case has nothing to do with the free exercise of political speech. Ignoring the central issue, the petitioner cites a number of cases, each highlighting the right to run for political office. (*Id.* at p. 22, fn 10). Yet as explained above, and as the lack of any evidence should indicate, the issue in this case is much narrower, more defined, and in most respects, more unique than the more general perceived right to run for political office. For this reason alone petitioner's cited political speech cases should be disregarded as they are inapplicable to the present matter.

With respect to the issue of whether an insubordinate, at-will employee may be terminated for announcing his intention to take his boss' job, quite simply, no real "split" or "confusion" among the circuits exists here, since a majority of circuits have never dealt with this issue directly. Further, of the circuits petitioner cites as having addressed the very issue, only the Fifth Circuit has denied qualified immunity, but in a clearly distinguishable context.[4] The

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[4] In *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992), the Fifth Circuit held a sheriff was not entitled to qualified immunity for demoting two deputy sheriffs to jail positions after announcing their candidacy for sheriff. However, contrary to the present matter, the Fifth Circuit noted that the sheriff's lack of any evidence that the demotion was due to insubordination, performance, or harmony concerns, as opposed to an alleged response to a personnel shortage at the jail, was fatal to his claim of qualified immunity. *Id.* at pp. 112-113. It does not appear from the opinion or the parties' briefs that insubordination was ever made an issue in that case. *Id.*; Brief for Appellants, *Click v. Copeland*, 1990 WL 10081065 (5th Cir. Feb. 7, 1990)(No. 90-5624); Brief for Appellees, *Click v. Copeland*, 1991 WL 11249488 (5th

remaining cases are either distinguishable on their face, or in some instances, actually *support* respondent's position.

For instance, petitioner cites *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999) for the proposition that candidacy for office constitutes political speech. (Pet. for Writ, p. 21). *Jantzen* should be more closely examined, however, since the 10th Circuit's holding actually supports respondent's position. In *Jantzen*, a candidate terminated from his position of deputy sheriff after announcing he would run against the incumbent sheriff, as well as deputy sheriffs and a jailer who were terminated after supporting the candidate, brought suit against the incumbent sheriff and board of county supervisors under § 1983 alleging that their terminations violated the First Amendment. *Id.* at pp. 1250-1251. Citing to *Carver* with approval, the 10th Circuit actually *affirmed* summary judgment on behalf of the sheriff dismissing the deputy candidate's First Amendment claim, holding:

> We find no genuine dispute of fact as to whether political affiliation and/or beliefs were substantial or motivating factors in firing Haugland. Haugland alleged and testified that the only reason he was fired was because he was a candidate for sheriff against his own boss. Given that the only factor driving Haugland's termination was his candidacy *qua* candidacy, Haugland has put forth no evidence that he was

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Cir. Apr. 3, 1991)(No. 90-5624). Compared with the present matter, the evidence shows petitioner's termination was due *solely* to his insubordination.

> in any way terminated for "supporting or affiliating with a particular political party.

Id. at pp. 1251-1252. The 10th Circuit reversed summary judgment as to the remaining employees who supported the deputy in his election bid, noting that those employees were entitled to First Amendment protection for their political affiliation and support of the deputy candidate. *Ibid.* Petitioner calls this result "bizarre" (Pet. for Writ, p. 23), but it nonetheless falls squarely in line with *Carver* and this Court's prior decisions. An insubordinate employee seeking to oust his own boss is not protected under the First Amendment, whereas political patronage, assuming it does not fall under a policymaking exception, is protected political speech.[5]

Petitioner next cites *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991) for the proposition that action taken to punish an employee for running against his boss' preferred candidate is unconstitutional. (Pet. for Writ, pp. 21-22). Once again petitioner seems to miss the mark, telling only some of the story in what is an easily distinguishable case. Unlike *Finkelstein*, where the district attorney had decided *not* to run for another term and suspended the employee in retaliation for the employee running against the district attorney's favored candidate, the respondent ran in the next election. Thus, unlike the present matter, at no point was the employee in *Finkelstein* ever competing against his boss for the boss' job. The present matter

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[5] *See generally Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

simply has absolutely nothing to do with a superior allegedly retaliating against his subordinate as a result of the subordinate running for office against a *third* party.

The petitioner also cites *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) claiming that an employee's interest in seeking office is protected under the First Amendment. (Pet. for Writ, pp. 22-23). Again, this case is distinguishable. In *Newcomb*, the city attorney retaliated against the deputy city attorney for running for Congress, *not* for running against the city attorney in an effort to take his job. Notwithstanding the fact that the 7th Circuit affirmed dismissal based on a policymaking exception, *Newcomb* is a political patronage case, *not* an insubordination case. *Compare Wallace v. Benware*, 67 F.3d 655, 661 (7th Cir. 1995) (an elected county sheriff could, without violating the First Amendment, discharge or demote a deputy that ran against him); *Wilbur v. Mahan*, 3 F.3d 214, 217-219 (7th Cir. 1993) (a sheriff could, without violating the First Amendment, restrict the free speech rights of a deputy who announced candidacy against the sheriff).

Finally, petitioner cites *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007) as proof that the Sixth Circuit itself is conflicted with its decision in *Carver*, leading to "unpredictable results." (Pet. for Writ, p. 23,, fn 11). *Murphy* is not an "unpredictable result" caused by *Carver*. In fact, the *Murphy* court was sure to point out that *Carver*, like this case, dealt with the narrow issue of whether an employee's candidacy against her own boss was protected, while also noting that the Sixth Circuit, contrary to what petitioner now claims, "had no intention of using the *Carver* case to resolve the

broader question of whether the First Amendment ever provides any protection for an individual's right to run for political office." *Murphy*, *supra* at p. 450 (quoting *Becton v. Thomas*, 48 F. Supp. 2d 747, 756 (W.D. Tenn. 1999)). The Sixth Circuit was faced with a singular, narrow issue in *Murphy*, to answer a "question left unanswered by *Carver:* whether the First Amendment protects a public employee from termination based on that employee's political expressions during her own candidacy." *Id.* at pp. 450-451. The court held such speech was protected, but only after finding that the plaintiff was terminated "*after* a 'spirited' campaign," and that the termination was "due to her political speech *during the course of the campaign*." *Id.* at pp. 448-449 (Emphasis added). To the contrary, respondent terminated the petitioner the moment he learned of the candidacy, not due to any political participation or speech, but solely because the petitioner was attempting to take respondent's job. The narrow issue present in this matter is clearly distinguishable from the narrow issue resolved in *Murphy*.

The Sixth Circuit's decision in *Carver* is limited to a very narrow and unique issue of law that most circuits have not directly addressed. Further, the present matter has nothing to do with the much broader question of political speech, especially in light of the fact there exists no evidence the termination was *caused* by political speech. As no actual or persistent split among the circuits exists, absent petitioner's own subjective views to the contrary, for these reasons and for the reasons set forth above the Petition should be denied.

II. PUBLIC POLICY DOES NOT MANDATE THIS COURT'S REVIEW OF THE LOWER COURTS' RULINGS.

One of petitioner's final arguments is a public policy concern that the district court and Sixth Circuit's rulings will have the effect of adversely impacting Bullitt County's "pool" of potential employees for public office by somehow limiting "the number and quantity of candidates for local elective office." (Pet. for Writ, p. 27). Respectfully, this argument amounts to nothing more than speculation *based* upon speculation. To assume these holdings have, or will have, *any* effect whatsoever on the pool of Bullitt County employees for elective office, without more, is simply meritless. It should be pointed out again that the petitioner ran for office in the both the primary and general election for Bullitt County Sheriff, thus nothing relating to this action, nor the lower courts' rulings, had any "adverse impact" on the political process in Bullitt County. In fact, petitioner *won* the primary. Obviously, at no point were Bullitt County voters denied petitioner's "informed opinions on important public issues." (*Id.* at p. 27). Finally, the idea that Bullitt County's pool of potential candidates will be adversely impacted carries no weight. After all, it was a third party *non*-employee that ultimately won the general election. It would seem Bullitt County's candidate pool is sound, and petitioner's public policy concerns in this regard are unfounded.

III. RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Based upon the foregoing, respondent has not committed any violation of petitioner's constitutional rights. Even assuming this case does, in fact, address the right to political participation itself, which there is no evidence to support, respondent is still entitled to qualified immunity as a matter of law since the petitioner cannot establish such a right was so clearly established that a reasonable official in respondent's position would have known that such conduct violated that right.

Government officials performing discretionary functions are generally entitled to qualified immunity from civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court and the Sixth Circuit have repeatedly recognized that "the right the official is alleged to have violated must be 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987); *Gazette v. City of Pontiac*, 41 F.3d 1051, 1065 (6th Cir. 1994). While this does not require that the very action in question be previously held to have been unlawful, this does require that "in light of pre-existing law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at pp. 639-640. Additionally, in the Sixth Circuit this standard requires that claims of immunity be analyzed on a fact-specific, case-by-case

basis to determine if a reasonable official in the respondent's position could have believed his conduct to have been unlawful in light of clearly established constitutional law. *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995).

Thus, to withstand the respondent's entitlement to qualified immunity, petitioner must clear two (2) hurtles: (1) the petitioner must show respondent's conduct violated a constitutional right; and (2) the petitioner must establish that the right violated was clearly established such that a reasonable official in respondent's position would have known that his conduct violated that right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Davis v. Brady*, 143 F.3d 1021, 1024 (6th Cir. 1998).

A. The Petitioner Has Failed to Allege a Violation of a Constitutional Right.

The first step in the qualified immunity analysis is to ask whether the petitioner is able to establish that a constitutional right has been violated. *Saucier*, 533 U.S. at p. 201. As previously explained, absent unsupported accusations and allegations, the undisputed facts show respondent has not committed any violation of petitioner's constitutional rights for terminating his employment based upon insubordination. Accordingly, respondent is entitled to qualified immunity from suit on this allegation under the clear dictates of constitutional law. If no constitutional right has been violated, there is no necessity for further inquiries concerning qualified immunity. *Id.* at p. 200. Therefore, summary judgment was properly granted, and the Petition should be denied.

B. Petitioner Fails to Establish That, Assuming a Constitutional Right Has Been Violated, That it Was Clearly Established Such That a Reasonable Official in Respondent's Position Would Have Known That Such Conduct Violated That Right.

In the alternative, even assuming for purposes of this Petition that this case does, in fact, address the right to political participation itself, respondent is still entitled to qualified immunity as a matter of law. Even if petitioner's First Amendment rights were violated in this regard, it was not clearly established as of the date of petitioner's termination that dismissal of a public employee for attempting to take his boss' job was constitutionally prohibited.

A right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates federal law." *Saucier*, 533 U.S. at p. 202. In order to show that the right violated was clearly established, the Court must look to prior decisions on a fact-by-fact, case-by-case basis. *Pray*, 49 F.3d at p. 1158. At the time of petitioner's termination there were no published decisions from this Court, the Sixth Circuit, or district courts within the Sixth Circuit that would have put respondent on notice that terminating an employee for insubordination after that employee has announced and confirmed his desire to take his employer's position would be unlawful in light of clearly established law. Respondent's reason for terminating the petitioner was because he wanted to take his job. In other words, regardless of whether this termination violated petitioner's right to political participation or political speech, no published case law

existed at that time from this Court, the Sixth Circuit, or district courts within the Sixth Circuit that, under the undisputed facts of this case, such a right was so clearly established that the respondent should have known this termination violated that constitutional right.

In fact, based on *Carver* the law of the Sixth Circuit as of the date of petitioner's termination dictated that such a dismissal *was* constitutionally permissible, and that the petitioner did not have a First Amendment right, clearly established or otherwise, to retain his position upon announcing and confirming his intention to run for his boss' position. As of September 7, 2005, the date of petitioner's termination, it must be concluded that the right allegedly violated was not clearly established at the time of the violation. On this basis respondent is entitled to qualified immunity, and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

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(3)

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In the Supreme Court of the United States

DAVID GREENWELL,

Petitioner,

v.

PAUL PARSLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent (i) denies the existence of a circuit split that the Sixth Circuit openly acknowledges (Opp. 16–21); (ii) assumes that *Carver* was correctly decided (Opp. 9–16); and (iii) claims entitlement to qualified immunity (Opp. 23–26).

In fact (i) there is an enduring circuit split that this case squarely implicates (see *infra* 1–5); (ii) *Carver* was wrongly decided in a way that conflicts with this Court's First Amendment jurisprudence (see *infra* 5–8); and (iii) respondent's alleged entitlement to qualified immunity is irrelevant to whether certiorari should be granted (see *infra* 9–11).

I. THE CIRCUITS ARE DIVIDED.

Respondent asserts that this case "does not implicate any circuit split." Opp. 8. But even the Sixth Circuit acknowledges that "[o]ther Circuits have not followed *Carver*." *Murphy*, 505 F.3d at 450 n.1. See also Pet. 20 n.9 (citing cases recognizing split); Paul Koster, *Handling Election Battle Fallout*, 47 No. 8 DRI FOR THE DEFENSE 39 (2005) ("courts throughout the country appear split" on whether a public employee's candidacy for political office implicates the First Amendment) (citing, *inter alia*, *Carver*, *Click*, and *Newcomb*). Respondent tries but fails to explain away this acknowledged split.

A. This Case Implicates A Public Employee's Right To Candidacy.

According to respondent, this case presents only "the very narrow issue of whether First Amendment protection * * * extends to the insubordination of a public employee stating his desire to take his boss'[s] job." Opp. 8. So seen, respondent asserts, this case

has nothing to do with a public employee's "right to run for political office" generally. Opp. 16. But the question presented in this case *does* implicate a public employee's right to candidacy in general and is *not* limited to situations in which the employee runs against his or her boss in particular.

In attempting to narrow the question presented, respondent ignores the basis for the decision below and the rule first articulated in *Carver*—namely, the Sixth Circuit's view that First Amendment protection does "not * * * extend[ ] to candidacy alone" and that "the simple announcement of a candidacy" does not constitute "protected political speech." Pet. App. 5a–7a. Although applied here and in *Carver* to instances in which public employees ran against their respective bosses, nothing in the Sixth Circuit's logic limits its application to such situations.

Indeed, two district courts recently interpreted *Carver* as applying to public employees' candidacies more generally. In *Sain* v. *Mitchell*, 2009 WL 1457722 (W.D. Tenn. 2009), the plaintiff was a state trooper who lost his job after running not against his boss (who held an appointed, state-level position), but for mayor. The court granted the defendants summary judgment based, in part, on *Carver*. See *id.* at *5 & n.6 ("it is not apparent whether the holding of *Carver* applies to all candidacies or just challenges against supervisors," but "[t]he fact that the Sixth Circuit emphasized the word 'candidacy' supports the notion that it intended the holding to apply to all types of candidacies"). As the court observed in *Summe* v. *Kenton County Clerk's Office*, 2009 WL 1684376, at *5 n.5 (E.D. Ky. 2009), "[a]lthough *Carver*, *Greenwell*, and *Myers* all involved the employee running against his/her current boss for

his/her boss's job, the same theory would apply to a non-incumbent."

As the *Sain* and *Summe* courts recognized, whether a public employee has a First Amendment interest in running for elected office does not depend on the identity of the employee's opponent.[1] There is therefore no merit to respondent's suggestion that *Carver* and the decision below are not in conflict with the Ninth Circuit's decision in *Finkelstein* and the Seventh Circuit's decision in *Newcomb*. Cf. Opp. 19–20 (attempting to distinguish *Finkelstein* and *Newcomb* on the ground that they involved candidacies against individuals other than the employees' respective bosses).

B. The Circuits Are Split On A Public Employee's Right To Run For Office Against The Employee's Boss.

Even if the issue presented by this case were as narrow as respondent claims, there still is a clear, persistent, and openly acknowledged circuit split in need of resolution. Both *Click* and *Jantzen* involved public employees who ran for office against their re-

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[1] That an employee has chosen to run against his or her boss might be relevant at the second stage of the *Pickering* analysis, which asks whether, given the employee's First Amendment interest in speaking on matters of public concern, "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. But the fact that the employee has chosen to run against his or her boss rather than against someone else is *not* relevant to the threshold question of "whether the employee spoke as a citizen on a matter of public concern." *Ibid.* If that question is answered in the affirmative, then First Amendment protections attach, regardless of whom the employee is running against. See Pet. 12–15 & n.6; see also *infra* at 5–7.

spective bosses. And, as explained in the petition (see Pet. 20–21), the holding in each squarely conflicts with *Carver* and the decision below.

According to respondent, *Click* is "clearly distinguishable" because "insubordination was [n]ever made an issue in that case." Opp. 17 & n.4. But that characterization of *Click* is inconsistent with respondent's theory in this case and with the Sixth Circuit's holding in *Carver*, according to which a public employee's declaration of candidacy against his or her boss is a *per se* act of insubordination (and thus, purportedly, unprotected by the First Amendment). Cf. *Carver*, 104 F.3d at 853 ("Carver's declaration of candidacy * * * was insubordination."); Pet. App. 14a ("As the court held in *Carver*, seeking election against a person's boss for his job is an act of insubordination not protected by the First Amendment."); Opp. 13 (describing petitioner's candidacy as "an insubordinate decision of an employee to take his boss'[s] job."). If, however, a public employee's candidacy against his or her boss is *per se* insubordination, then—contrary to respondent's characterization—*Click*, which indisputably involved employees who ran against their boss, necessarily involved "insubordination" too and thus cannot be distinguished on that basis.

Respondent's attempt to distinguish *Jantzen* also fails. According to respondent, *Jantzen* stands for the proposition that "[a]n insubordinate employee seeking to oust his own boss is not protected under the First Amendment." Opp. 19. But that is not accurate. As explained in the petition (see Pet. 21–24), *Jantzen* differentiated the employee's speech rights and associational rights. Although *Jantzen*, citing *Carver*, held that the employee's *associational* rights were not implicated by his firing (see 188 F.3d at

1252), it also held that the employee's *speech* rights were implicated because "candidacy for office" constituted "political speech" that "undoubtedly relates to matters of public concern" and therefore "satisfies the first prong of the *Pickering/Connick* test" (*id.* at 1257).[2] That holding squarely conflicts with *Carver*, which expressly held that "*Pickering* * * * do[es] not apply" when a public employee announces his or her candidacy for the office held by his or her boss. 104 F.3d at 852.

II. *CARVER* WAS WRONGLY DECIDED.

According to respondent, "[t]he First Amendment has not been implicated in this case" because "[d]ismissal of an employee for insubordination is both proper and reasonable as a matter of law under *Carver*." Opp. 8, 13. But respondent assumes precisely that which must be proven. The very question in this case is whether *Carver* was correctly decided. It was not.

A. *Carver* Is Contrary To *Pickering*.

Carver holds that a public employee's candidacy against his or her boss is "insubordination" and for that reason entitled to no First Amendment protection. 104 F.3d at 853. That, however, is contrary to this Court's First Amendment jurisprudence.

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[2] Having found that the employee's candidacy constituted political speech on a matter of public concern, and was therefore entitled to First Amendment protection, the court proceeded to the second stage of the *Pickering* analysis, at which point it concluded, under the specific circumstances of the case, that the employee's speech interest did not outweigh the employer's interest in the efficient provision of government services. See *Jantzen*, 188 F.3d at 1258.

Because public employers rarely discipline employees who praise the employer, public employee speech cases tend by their very nature to be "insubordination" cases. Indeed, *Pickering* itself involved an employee who had verbally "attack[ed]" his employer using assertions that this Court agreed were "false." *Pickering*, 391 U.S. at 566, 570. Although the employee "made erroneous public statements * * * critical of his ultimate employer," this Court determined that his conduct enjoyed First Amendment protection because "it is essential that [public employees] be able to speak out freely on [matters of public concern] without fear of retaliatory dismissal." *Id.* at 572. Thus, contrary to *Carver*, "insubordinate" conduct is not automatically beyond the First Amendment's reach.

Having erroneously classified "insubordination" as categorically beyond First Amendment protection, the Sixth Circuit—in this case as in *Carver*—failed to apply the two-step analytic framework mandated by *Pickering*. See Pet. 13–16. Rather than "balanc[ing]" the employee's interest in speaking on matters of public concern and the employer's interest in the efficient delivery of public services (391 U.S. at 568), the Sixth Circuit simply denied the existence of the employee's First Amendment interest altogether. That cannot be reconciled either with this Court's repeated recognition that electoral speech lies at the core of First Amendment protections (see Pet. 9–11, 14 (collecting cases)) or with this Court's insistence that statements on matters of public concern by public employees "be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Pickering*, 391 U.S. at 574.

A public employee's interest in speaking on a matter of public concern might sometimes be outweighed by the employer's interest in the efficient provision of public services. Compare, *e.g.*, *Click*, 970 F.2d at 112 ("On these facts the balancing clearly tips in favor of the [employees]."), with *Jantzen*, 188 F.3d at 1258 ("Under these circumstances, [the employee's] interest in his speech does not outweigh the defendants' interest in efficient law enforcement."). But as *Click* and *Jantzen* (both of which involved deputy sheriffs running against the incumbent sheriff) demonstrate, that determination must be made on a case-by-case rather than categorical basis.

B. *Carver* Rests On An Overly Restrictive Conception Of Politics.

Carver held that the dismissal of a public employee "discharged solely because she announced her candidacy" against her boss "implicate[d] none of the concerns raised by *Elrod* or *Branti*" because it "was not a dismissal because of political beliefs or affiliations" and indeed "was not a dismissal based on politics at all, except to the extent that running for public office is a political exercise in its broad sense." 104 F.3d at 850.

Carver's holding rests on an unduly restrictive conception of politics, political belief, and political affiliation. Running for public office is a political exercise not merely in the "broad sense" of the term but in every sense. Moreover, a candidacy announcement is necessarily a declaration of political belief—the candidate's belief that he or she, rather than the opposing candidate, should be elected, and that the candidate's policies, rather than those advocated by the opponent, should be implemented. Furthermore, a candidacy announcement necessarily implicates

the candidate's associational rights because an electoral campaign is by its very nature meant to attract like-minded people—to volunteer, to donate, and ultimately to vote. Accordingly, when a public employee is dismissed for announcing a candidacy for elected office, that dismissal does, contrary to *Carver*, implicate the concerns raised by *Elrod* and *Branti*.

III. THE SIXTH CIRCUIT'S RULE CHILLS PROTECTED SPEECH.

Respondent dismisses as mere "speculation" petitioner's observation that *Carver* chills the political speech of public employees. Opp. 22; cf. Pet. 25–28. But this Court correctly recognizes that "the threat of dismissal from public employment is * * * a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574.

Respondent points to petitioner's own candidacy as evidence that there is no chilling effect. But petitioner, who was fired as a result, paid a steep price for his candidacy—a price that under the First Amendment he should not have had to pay.

In any event, the question is not whether petitioner was deterred from running but whether *others*, knowing what happened to petitioner, will be deterred in the future. First Amendment cases alleging actual (as opposed to imminent) injury are, by definition, brought by individuals who were not themselves deterred from exercising their rights. But the right to free speech is not reserved for only those who are the most resistant to intimidation. Accordingly, when considering the consequences of the Sixth Circuit's rule, this Court must consider the rule's likely chilling effect on future potential candidates.

IV. CERTIORARI SHOULD BE GRANTED WHETHER OR NOT RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY.

Respondent's claimed entitlement to qualified immunity is no impediment to granting certiorari.

A. Respondent Is Not Entitled To Qualified Immunity.

Respondent claims that he is "entitled to qualified immunity as a matter of law." Opp. 23. He is not. The Court's decisions leave—and as of petitioner's termination in 2005 left—no doubt that citizens, including public employees, have a First Amendment interest in running for elected office, speaking on matters of public concern, and participating in the political process. See Pet. 8–20. In light of that precedent, qualified immunity is unavailable because "a reasonable person would have known" (*Pearson* v. *Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks omitted)) that firing petitioner because of his candidacy violated petitioner's rights under the First Amendment. Indeed, the Fifth Circuit has found—in the specific context of deputies running against an incumbent sheriff—that a public employee's right to run for the office held by his or her boss was already "clearly established" by 1988. *Click*, 970 F.2d at 109–113.[3]

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[3] Because its adjudication might depend on facts that are not in the record (*e.g.*, the precise duties of Bullitt County deputy sheriffs and the county's past experience with deputies running for elected office), the question of qualified immunity might be best left to the lower courts on remand.

B. Certiorari Should Be Granted Even If Respondent Is Entitled To Qualified Immunity.

Even if respondent were entitled to qualified immunity, certiorari should be granted.

Whether an official is entitled to qualified immunity depends on a two-part inquiry: (i) whether a constitutional right was violated on the facts alleged or established; and, assuming such a violation occurred, (ii) whether the constitutional right was clearly established at the time of its violation. See *Pearson*, 129 S. Ct. at 815–816.

Until recently, the lower courts were required to reach the constitutional issue first, and only then decide whether the asserted right was clearly established at the relevant time. See *id.* at 818, overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001). Addressing the constitutional issue first was believed "necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation." *Id.* at 816 (quoting *Saucier*, 533 U.S. at 201). And although addressing the constitutional issue first is no longer mandatory, this Court continues to recognize that doing so "is often appropriate" because it "promotes the development of constitutional precedent." *Id.* at 818.[4]

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[4] This Court routinely grants certiorari to review, and then reaches, the constitutional question although the defendant might be entitled to qualified immunity because of a division among the lower courts. See, *e.g.*, *Safford Unified Sch. Dist.* v. *Redding*, ___ U.S. ___ (2009) (deciding constitutional question despite finding qualified immunity); *Soldal* v. *Cook County*, 506 U.S. 56 (1992) (granting certiorari and reversing despite lower court finding that no constitutional violation had occurred).

None of the reasons identified in *Pearson* for why a lower court might choose to avoid the constitutional question applies here. First, given this Court's position atop the judicial hierarchy, neither this case nor any other before this Court is a case in which "the question will soon be decided by a higher court." *Id.* at 819. Second, given the clarity of this Court's First Amendment jurisprudence, this is not a case in which it is "far from obvious whether in fact there is" the constitutional right invoked by petitioner. *Id.* at 818. Finally, because the question presented is unlikely to "arise in cases in which [the qualified immunity] defense is not available" (*id.* at 822), answering that question in this case is "especially valuable" for "the development of constitutional precedent" (*id.* at 818).

If the existence of a circuit split on the constitutional issue automatically entitled the defendant to qualified immunity, and if the defendant's entitlement to qualified immunity automatically precluded certiorari, then plaintiffs who lost below could never obtain review in this Court on constitutional issues as to which the circuits are split. Only defendants who lost below would have access to this Court.

But that cannot be so. Such asymmetric access would not only be unfair, but would likely leave many circuit splits unresolved. In circuits where the relevant constitutional right has been recognized, cases presenting the constitutional issue will no longer arise because potential defendants will avoid the forbidden conduct. In circuits where the right has not been recognized, defendants who engage in such conduct will win any ensuing suit, and would

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Qualified immunity protects officials when the law is unclear; certiorari review clarifies the law.

then avoid review in this Court on qualified immunity grounds. Consequently, if a circuit split on the constitutional issue automatically entitles the defendant to qualified immunity, and if the defendant's entitlement to qualified immunity automatically precludes certiorari, then the very cases that most require this Court's intervention—namely, cases involving constitutional issues on which the circuits are divided—would be effectively immune from such review.

CONCLUSION

The petition should be granted.

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